Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,

Petitioner,

versus

BAYOU STEEL CORPORATION,

Respondent,

and

HARRY ABADIE, JR., et al.,

Respondent.

Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

DENISE ANN NAGEL,
La. Bar #8743*
Senior Attorney
Office of the Secretary
Louisiana Department of Labor
P.O. Box 94094
1001 North 23rd Street
Baton Rouge, Louisiana
70804-9094
Phone: (504) 342-3044
Facsimile: (504) 342-7593
**Counsel of Record*

VIRGINIA GERACE BENOIST,
La. Bar #22256
Assistant Attorney General
Louisiana Department of Justice
P.O. Box 94094
1001 North 23rd Street
Baton Rouge, Louisiana
70804-9094
Phone: (504) 342-7557
Facsimile: (504) 342-7593

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QUESTIONS PRESENTED

For unemployment compensation purposes, under the following conditions:

a) claimant is a union worker who was performing services for remuneration under collective-bargaining agreement;

b) term of collective-bargaining agreement expires;

c) claimant and former employer fulfilled obligations under the collective-bargaining agreement during the term of such agreement;

d) on day after termination of employment contract, claimant ceases to perform services for remuneration;

e) while former employer offers claimant terms of new contract of hire, it hires new workers for replacement under written agreement for indefinite, at-will employment; and

f) the union is interested in further negotiation of terms of reemployment of its membership

and where the sole governing bodies of federal law for administration and certification of any State unemployment compensation program are the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA):

a. Whether judgment by the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, is erroneous in

QUESTIONS PRESENTED – Continued

its application of the concept of definition of "employee" under the National Labor Relations Act (NLRA), rather than application of the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under the unemployment compensation program for union-affiliated claimants.

b. Whether such claimant rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated by the administration of the unemployment compensation program under judicial interpretation of the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, which applies the concept of definition of "employee" under the NLRA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under the unemployment compensation program for union-affiliated claimants.

c. Whether such claimant rights under the Due Process Clause of the Fifth Amendment of the United States Constitution are procedurally violated by the administration of the unemployment compensation program under judicial interpretation of the Louisiana Court of Appeal, Fifth Circuit, styled *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, which applies

QUESTIONS PRESENTED – Continued

the concept of definition of "employee" under the NLRA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under such program for union-affiliated claimants and whereby the LDOL will be unlawfully and unconstitutionally restricted to ask in the future whether (1) the claimant is a member of a union and (2) whether the work of such claimant and his union-affiliated cohorts is discontinued without delving further to determine other facts (i.e. cause of unemployment, status of contract of hire), as will be inquired of any non-union claimant.

PARTIES

Petitioner Gayle F. Truly, Administrator of the Office of Employment Security and Secretary of Labor, a defendant in this matter for judicial review of unemployment compensation, is a statutory party under LSA-R.S. 23:1634, which provides the basis and jurisdiction for judicial review of the State courts, in support of award of unemployment compensation benefits to claimants and has a statutory duty to administer and enforce laws and programs designed to protect Louisiana's work force and to represent the public interest in the administration of Louisiana employment security law. LSA-R.S. 36:304. She is to ensure that the provisions for the unemployment compensation program are so interpreted and applied as to meet the requirements of federal constitutional and statutory laws and regulations. U.S. Const. amend. V; U.S. Const. amend. XIV; 42 U.S.C. 1983; 42 U.S.C. 503; LSA-Const. Art. 1, Sections 2 and 3; LSA-R.S. 36:304; LSA-R.S. 23:1471 et seq.; LSA-R.S. 23:1627.

Respondent Bayou Steel, employer-defendant in this matter for judicial review, is a statutory party under LSA-R.S. 23:1634 in opposition to Petitioner's award of unemployment compensation benefits to union claimants.

Respondents Harry Abadie, Jr. et al[1], claimant-plaintiffs in this matter for judicial review, are the approximately 231 statutory parties under LSA-R.S. 23:1634, in favor of Petitioner's award of unemployment compensation benefits to such union claimants.

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[1] See Appendix for list of Respondent Claimant Parties.

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Petitioner Gayle F. Truly, Administrator of the Office of Employment Security and Secretary of Labor respectfully petitions for a writ of certiorari to review the judgment in *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403 (writs denied).

OPINIONS BELOW

The opinion in *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403, writs denied.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on February 3, 1995.

Jurisdiction of this Court is invoked generally under the U.S. Constitution, art. 3, Section 1; U.S. Constitution, art. 3, Section 2, Clause 1; and specifically under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Constitutional Provisions:

U.S. Const. amend. 5
U.S. Const. amend. 14

(b) Statutory Provisions:

26 U.S.C. 3301 et seq. (Federal Unemployment Tax Act)
42 U.S.C. 501 et seq. (Social Security Act)
29 U.S.C. 151 et seq. (National Labor Relations Act)
42 U.S.C. 1983 et seq. (Civil Action for Deprivation of Rights)

Significant constitutional provisions and statutes involved in the case, as well as the pertinent text, setting them out verbatim, and giving appropriate citation therefor are provided in the Appendix. The Appendix also includes pertinent text of significant State constitutional provisions, statutes, and cases.

STATEMENT OF THE CASE

A. SYNOPSIS

This case involves approximately 231 union-affiliated claimants who performed services for remuneration under collective-bargaining agreement, which term was extended twice during negotiations that began prior to expiration of term of the original contract. On the day after the expiration of the extended contract, claimants ceased to perform services for remuneration, thus were not "employed" under the concepts of definitions of FUTA and SSA. After two extensions to the original term of the contract, former employer and claimants could not and have not reached agreement as to terms of new contract of hire although negotiations have continued. Immediately after the expiration of the extended contract, the Company hired replacement workers under written

agreement for indefinite, at-will employment. This case does not involve a work stoppage during the term of the collective-bargaining agreement. During the term of the collective-bargaining agreement, the parties fulfilled their obligations under the agreement.

For the ease and convenience of the court, the following is the sequence of events in approximate, chronological order:

> January 15, 1993: Company and union begin discussions of new terms of upcoming contract.
>
> February 24, 1993: (1) Union membership authorizes strike if settlement cannot be reached at expiration of contract. (2) On or about this date, Company preparations for strike include plans to hire replacement workers in event of strike.
>
> February 28, 1993: (1) Original expiration of contract. (2) Company and union agree to two (2) separate extensions to the collective-bargaining agreement. (Term of second extension of contract expires March 20, 1993 midnight.)
>
> March 19, 1993: Company and union fail to reach settlement on terms of new contract; union gives Company 48 hours notice of strike.
>
> March 20, 1993: Company makes offer to union and informs union that if offer rejected, employer will determine that an impasse has been reached and that the conditions of the previous March 19 offer will be imposed. Union officials, through authority of February 24 vote of membership, reject the Company offer and advise Company that strike will proceed.
>
> March 21, 1993: First day after expiration of extensions for collective-bargaining agreement.

March 23, 1993 and/or earlier: Likely commencement of hiring of replacement workers.

April 21, 1993: Louisiana Department of Labor (LDOL) makes initial determination of filed claims upon gathered information and disqualifies claimants for benefits under LSA-R.S. 23:1601(4).

April 1-21, 1993: Telephone investigation by LDOL.

April 27, 1993: On-site visit to Company by LDOL.

May 4, 1993: LDOL makes subsequent determination upon review of findings through further investigation and on-site visit to Company for qualification of claimants for benefits.

B. FINDINGS OF FACT

Judicial review by the Louisiana State courts is limited under the provisions of LSA-R.S. 23:1634 to the findings of fact in the decision of the Louisiana Board of Review. Such findings of fact are provided in the Appendix. Questions presented to this Court were considered and presented by Petitioner in all stages of the State court proceedings. The method of raising them and the way in which they were passed upon by those courts, including such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears as will show that the federal questions were timely and properly raised so as to give this Honorable Court jurisdiction to review the judgment on a writ of certiorari, are provided in the Appendix.

REASONS FOR GRANTING THE PETITION

1.

IMPORTANT QUESTION OF FEDERAL REMEDIAL LAW WHICH CONFLICTS WITH FEDERAL CONSTITUTIONAL AND STATUTORY LAW

Issues of Significant Public Importance

This case is of significant public importance because the decision below is erroneous, and the issues that it addresses are important for the fair administration of the State unemployment compensation program. Unemployment is the greatest hazard of our economic life. *National Gypsum Company v. Administrator, Louisiana Department of Employment Security,* 313 So.2d 230 (La. 1975). The State court has decided an important question of federal remedial law which conflicts with federal constitutional and statutory law and should be settled by this Honorable Court. The judgment of the State court forces the State unemployment compensation program to penalize the constitutional and statutory rights of approximately 231 union-affiliated claimants, who have been deprived unemployment compensation benefits due to judicial discrimination against their union affiliation, although such claimants fulfilled the obligations under the terms of their collective-bargaining agreement with their former employer for purposes of unemployment compensation during the term of the collective bargaining agreement. The basis of this judicial penalty arises out of failure to apply the proper body of law.

The Federal Unemployment Tax Act and the Social Security Act, as sole governing bodies of federal law for State unemployment compensation program, pre-empts

State law in specific manner to accomplish uniformity for certification for federal funding. Such statutory pre-emption reflects congressional intent, which would not embrace the creation by the State court of classes of claimants under discriminatory treatment in violation of constitutional rights to equal protection and due process for the award of unemployment compensation. The language of the State statute itself in the Louisiana Employment Security Law under LSA-R.S. 23:1601(4), however, does not result in unfair treatment. If a union worker discontinues his work during the term of employment in dispute with his employer, such disqualification justifiably applies in accordance with the statutory prohibition. If the cause of unemployment, for purposes of unemployment compensation, however, is the expiration of contract, such as, in this case, such cause should be recognized and examined as would for the non-union worker. *National Gypsum*, 313 So.2d 230. There is no compelling justification by the State court to ignore the expiration of contract for the union worker in contrast to the non-union worker. There is no evidence that Congress enacted the National Labor Relations Act, 42 U.S.C. 151, with the intent to utilize such federal act as a basis for denial to the states the provision of unemployment compensation to union workers whose contracts of hire have expired. *New York Telephone Company v. New York State Department of Labor*, 99 S.Ct. 1328, 440 U.S. 519 (1979). It is the erroneous judicial interpretation of such disqualifying provision by the State court that has extracted federal labor law to create a class of union-affiliated claimants whose term of employment contract, upon expiration, is completely disregarded in direct contrast to the non-

union claimant. The omission of any direction under the National Labor Relations Act or the Social Security Act for payment of unemployment compensation under labor relations implies that the states have the power to fashion such policy; however, any denial of payment of such benefits should not be based upon speculation about the unexpressed intent of Congress. *New York Telephone v. New York State Department of Labor,* supra. *This important issue presented to court is, thus, a very novel one in regard to unemployment compensation involving labor disputes. The freedom of the state to dictate policy as to the qualification requirements in claims involving any labor dispute is not the challenged issue heard in prior court deliberations. The prerogative of the state court to interpret any such state qualification provision so as to unfairly distinguish between the union and non-union worker upon expiration of contract is rather the serious question presented for hearing before this court for the first time.*

The effect of this misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs that first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, which is completely and absolutely contrary to the provisions of 42 U.S.C. 503(a)(1), unless and until such time that employer closes his business. In contrast, expiration of contract for the non-union worker is recognized.

The judicial interpretation is, furthermore, fundamentally erroneous as any right to unemployment compensation benefits cannot be waived, released, or commuted, in accordance with the SSA, and there can be no collective bargaining of such to address in labor-management negotiations. 42 U.S.C. 503(a)(1); LSA-R.S. 23:1691.

The misapplication of federal law and failure to recognize the constitutional rights of union-affiliated claimants subject them to an endless state of limbo as to status of employment, for unemployment compensation purposes, resulting in disparate treatment for purposes of disqualification of classes of claimants. If expiration of contract is not recognized for the union worker in unemployment compensation matters, the term of the contract is endlessly open-ended, and such term actually becomes unimportant as early as that moment the union worker first signs the first collective bargaining contract with that employer. The effect of this misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs that first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, unless and until such time that employer closes his business, which is completely and absolutely contrary to the provisions of the § 303(a)(1) of the SSA. In contrast, expiration of contract for the non-union worker is recognized.

Further, the misapplication of concepts of federal law by the State courts negates the positions of neutrality of the State by encouraging delay on the part of the employer to reach a meeting of the minds on the terms of a new collective bargaining agreement, whereby the expiration of the contract of the employment relationship is not recognized as long as the State court remains misdirected in its concept of employment for purposes of unemployment compensation, there is no encouragement of prompt resolution and negotiation, thereby tipping the scale for balance of hardship in favor of one party and

threatening social security and the very protection of the unemployment compensation program against unemployment, as should be defined by the proper federal law under FUTA and SSA, making a mockery of the unemployment compensation program as a remedial program and protector against unemployment.

This application does not seek to challenge the propriety and constitutionality of the language of the State statute or regulate or prohibit private conduct or behavior in the labor-management field. Further, it does not ignore the applicability of other provisions for disqualification for unemployment compensation benefits under particular circumstances for the union-affiliated claimant. This application rather involves the misinterpretation of State law by the State court of a State program for distribution of unemployment compensation benefits to certain members of the public and the manner in which such program treats claimant where:

a) claimant is a union worker who was performing services for remuneration under collective-bargaining agreement;

b) term of collective bargaining agreement expires;

c) claimant and former employer fulfilled obligations under the collective bargaining agreement during the term of such agreement;

d) on day after termination of employment contract, claimant ceases to perform services for remuneration;

e) while former employer offers claimant terms of new contract of hire, it hires

replacement workers under written agreement for indefinite, at-will employment; and

f) the union is interested in further negotiation of terms of reemployment of its membership,

in violation of the sole governing bodies of federal law under FUTA and SSA for the administration and certification of any State unemployment compensation program as well as in violation of constitutional law.

While Congress has been sensitive to the importance of the State's interest to fashion its own unemployment compensation programs, especially its own eligibility criteria, such state freedom does not rise to the level or include discrimination of certain classes of claimants in violation of federal constitutional and statutory law.

2.

JUDICIAL INTERPRETATION CONFLICTS WITH STATUTORY LAW

Federal Unemployment Tax Act (FUTA) – Social Security Act (SSA) – National Labor Relations Act (NLRA)

The United States Congress has recognized the nature of unemployment compensation as remedial in the embodiment of the Federal Tax Unemployment Tax Act (FUTA) at 26 U.S.C. 3301 et seq. and the Social Security Act (SSA) at 42 U.S.C. 501 et seq. and did not supercede or replace such law with the National Labor Relations Act (NLRA) at 29 U.S.C. 151 et seq. for purposes of unemployment compensation.

Judicial interpretation by the State court of qualification for entitlement of unemployment compensation under LSA-R.S. 23:1601(4), which pertains to qualification under a labor dispute, however, ignores the concepts of definitions of "employment" and "unemployment" under the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), the sole governing bodies of federal law for unemployment compensation benefits, which do require performance of services for remuneration for determination of benefits of the unemployed. 26 U.S.C. 3306. Rather the judicial interpretation by the State court imposes upon the State unemployment program to erroneously create an artificial state of employment imposed by the concepts of another body of law, specifically the NLRA, a separate and distinct body of federal law that addresses collective bargaining. *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La. App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403. Most importantly, the judicial interpretation by the State court imposes the NLRA definition of "employee" to the union-affiliated claimant, a term that, contrary to FUTA and SSA, does not require the performance of services for remuneration. The State court decision incorrectly concludes that such union claimants have not lost their employment contract because employment continues during a labor dispute under the concept of "employee" under the NLRA. 29 U.S.C. 152. The State court further assumes that expiration of contract is not pertinent for unemployment purposes because the concept of "strike" under the NLRA exists even after expiration of the contract of hire. 29 U.S.C. 142. Such

conclusions reflect complete confusion of the State court, consistent with a line of Louisiana jurisprudence, as to the applicability of the proper body of law for unemployment compensation purposes. The unmistakable result of such judicial confusion over applicable federal law is creation of a class of claimants unfairly and unequally treated from other claimants. *Elmer Candy Corporation v. Administrator of Employment Security,* 286 So.2d 423 (La.App. 1 Cir. 1973), rehearing denied; *Piggly Wiggly of Springhill, Inc. v. Gerace,* 370 So.2d 1327 (La.App. 2 Cir. 1979).

The judicial interpretation is, furthermore, fundamentally erroneous as any right to unemployment compensation benefits cannot be waived, released, or commuted, in accordance with the SSA, and there can be no collective bargaining of such to address in labor-management negotiations. 42 U.S.C. 503(a)(1); LSA-R.S. 23: 1691.

Under such judicial interpretation, union-affiliated claimants who have fulfilled their obligations under contract, for unemployment compensation purposes, are considered employees although their contract of hire has expired and they are no longer performing services for remuneration.

3.

CONSTITUTIONAL REASONS

Equal Protection Under U.S. Constitution, Amendment XIV; Procedural Due Process Under U.S. Constitution, Amendment V

A. Equal Protection

The LDOL is mandated to enforce a manifestly erroneous State court interpretation of federal constitutional

law which adversely impacts the public interest in the administration of the State unemployment compensation program. 42 U.S.C. 1983 et seq. The rights of such claimant under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated by and under the administration of the unemployment compensation program, whereby the provisions of the NLRA for the definition of "employee" apply to the union-affiliated unemployment compensation claimant. 29 U.S.C. 152.

This State court decision follows the long line of Louisiana jurisprudence that does not recognize the cause of unemployment for the union worker. *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al., supra.* The State court, including the Louisiana case law, takes a simplistic approach of automatically disqualifying a union claimant without further examination as to cause of separation from employment. The status of the contract of hire and the issue of performance of services for remuneration are not reviewed, as for all claimants. For purposes of unemployment compensation, however, there is a separation from employment at the moment of termination of any such employment relationship, consistent with the concept of employment under federal law. 26 U.S.C. 3306. The conflicting result is that the status of the hiring contract is factually examined for non-union workers but is not examined for union workers. If a non-union worker files an unemployment compensation claim upon termination of his contract, such cause of separation from employment will be recognized and examined by the State courts to determine qualification. On the other hand, the State court dictates that the cause of separation

from employment for a union worker is not examined. Such distinction by the State courts mandates disparate treatment of the union worker compared to the non-union worker for unemployment compensation purposes. The equal protection rights of the union worker are, thus, violated by the decision of the State court. U.S. Const. amend. 14; LSA-Const. Art. 1, Section 3. The relevant State provision for disqualification due to a labor dispute distinctly states that unemployment must be due to a labor dispute. LSA-R.S. 23:1601(4). Yet the facts of the case at hand show that, for purposes of unemployment compensation, the unemployment of the union workers arose due to the expiration of the employment contract. Indeed, this is not a case of breach of contract or of a "wildcat" strike. At the moment of expiration of the employment contract, the union-affiliated claimants no longer performed work for remuneration and were unemployed for purposes of unemployment compensation. LSA-R.S. 23:1472(12)(A); LSA-R.S. 23:1472(19)(a). For unemployment compensation purposes, the employment relationship of the employer and claimants ended. Any work stoppage did not occur until the expiration of the contract. The State court, including the State jurisprudence, has consistently failed to recognize that the actual cause of unemployment for the union worker must be fully examined rather than assumed under law in the same order and manner as for the non-union claimant. LSA-R.S. 23:1601. Where the cause of unemployment is ignored, such discriminatory result occurs.

B. Procedural Due Process

Where the union-affiliated claimant is automatically disqualified under the labor dispute disqualification, he,

furthermore, is not equally granted the procedural due process under Amendment V of the United States Constitution as is afforded the non-union claimant. LSA-Const. Art. 1, Section 2. Again, the effect of the misapplication of the concepts of the NLRA to the unemployment compensation program entraps the union worker in that once he signs the first collective bargaining agreement with that employer, he waives, releases, and commutes his rights, which effect is not only completely and absolutely contrary to the provisions of § 303(a)(1) of the SSA but also denies such claimant access to his rightful procedural due process. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971). If such claimants were non-union and had filed claims after the expiration of the contract of hire due to failure to agree to new terms of hire, such claims would have been examined by the courts differently to fully determine if such separation was a qualifying discharge or leaving under the respective disqualifying provisions for separation from employment. The same legal examination should be equally provided by the State courts to the union worker upon unemployment at termination of his employment contract. Otherwise, the union worker is penalized by the State courts for his affiliation and choice of affiliation by automatic disqualification under the state labor-dispute provision. The clear intent of such disqualification is found in the language of the state statute itself, wherein the unemployment must be "due to a labor dispute". In the matter at hand, the unemployment of the union workers was due to an expired employment contract and the parties have not reached agreement as to terms of a new contract; therefore, review should have fallen rather

under the other disqualifying provisions of LSA-R.S. 23:1601 for review as to qualification.

The disqualification statute for labor dispute, would not violate any constitutional rights of equal protection, if its very language, as written, were recognized and abided by the State courts. LSA-R.S. 23:1472(12)(A); LSA-R.S. 23:1472(19)(a); LSA-R.S. 23:1601(4). Where a union worker discontinues performance of work during the term of employment, then such statutory disqualification is applicable and would not result in any unfair treatment of the union worker. In such manner, both the non-union claimant and the union claimant would be equally treated under the same factual analysis of cause of separation, for purposes of unemployment compensation.

This failure by the State court to distinguish the separate bodies of law has further amplified the violation of constitutional rights of equal protection and procedural due process of the union claimant. For unemployment compensation purposes, the expiration of the contract of hire is recognized for the non-union claimant and should, therefore, be consistently recognized and reviewed for the equal and fair treatment and procedural due process of the union claimant.

4.

INFRINGEMENT OF STANDARDS OF PROMPT PAYMENT

***Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971)**

If FUTA is to be applied under NLRA dictates and the lengthy wait for National Labor Relations Board

(NLRB) decisions, the very purpose of prompt payment required of State unemployment compensation programs under *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971) is denied. In *Java*, the Supreme Court held that the words "when due" in § 303(a)(1) of the SSA meant "at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Also, LSA-R.S. 23:1635. Expiration of contract under a claim of a union claimant should be administered and processed in equal treatment of expiration of contract of any non-union claimant; otherwise, any delay of processing of such claim of a union claimant results in violation of the "prompt payment" rule under the SSA on the basis of unfair distinction of class of claimant. In the case at bar, the union claimants made initial claims immediately after expiration of contract and thus an equal treatment with any non-union claimant, payment of unemployment compensation was promptly due upon examination of claim for cause of separation and application of the concepts of definitions of "employment" and "unemployment" for unemployment compensation purposes. Under the State court rationale, a union claimant is never unemployed. The severing of the employment relationship was not only demonstrated by the expiration of contract but also revealed on record by the employer that positions for such union claimants were only available upon vacancy. (See Appendix – Board of Review.) Investigation by the Louisiana Department of Labor resulted in inability to determine which, if any, positions were available. Yet, the State court refused to recognize such clear evidence of

severance of the employment relationship on the mere basis that the claimants were union employees.

5.

FUTURE RISK OF MISINTERPRETATION OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW

As a result, the following federal statutory and constitutional provisions are at risk of future misinterpretation, misapplication, or non-application: U.S. Const. amends. 5 and 14; 26 U.S.C. 3301 et seq. (Federal Unemployment Tax Act); 29 U.S.C. 141 et seq. (Labor Management Relations Act); 29 U.S.C. 151 et seq. (National Labor Relations Act); 42 U.S.C. 501 et seq. (Social Security Act).

The LDOL is mandated to enforce a manifestly erroneous State court interpretation of federal statutory law which adversely impacts the public interest in the administration of the State unemployment compensation program in an unconstitutional manner. 42 U.S.C. 1983 et seq. The State courts have committed gross and manifest error by violating the provisions of FUTA and SSA, the sole governing bodies of federal law for administration of any State unemployment compensation program, through application of the concept of definition of "employee" under the National Labor Relations Act (NLRA), rather than the concepts of definitions of "employment" and "unemployment" under FUTA and SSA, for determination of benefits under such program for union-affiliated claimants. 29 U.S.C. 152; 26 U.S.C. 3306.

6.

UNLAWFUL ADMINISTRATION OF STATE UNEMPLOYMENT COMPENSATION PROGRAM

Unlawful Denial of Benefits to the Union Worker

If the decisions of the State courts stand, the Petitioner will be left to administer an unemployment compensation program that will be unlawfully and unconstitutionally restricted to ask only (1) whether the claimant is a member of a union and (2) whether the work of such claimant and his union-affiliated cohorts is discontinued. 42 U.S.C. 1983 et seq. It will be of no moment for the Petitioner to delve further to determine other facts (i.e. cause of unemployment, status of contract of hire), as is inquired of any non-union claimant. Disqualification of a union-affiliated claimant will be automatic where the work of such claimant is discontinued. The U.S. Constitution, as well as the SSA and FUTA, the sole governing bodies of federal law for administration and certification of any State unemployment compensation program, will have no bearing upon an unemployment compensation claim and provide no equal protection to a particular class of workers, that being the union-affiliated workers. The definition of "employee" under the National Labor Relations Act (NLRA), a body of federal law that is separate and distinct from SSA and FUTA, rather than the concepts of definitions of "employment" and "unemployment" under SSA and FUTA, for determination of benefits under such program for a judicially created class of union-affiliated claimants will be applied. 29 U.S.C. 152; 26 U.S.C. 3306.

7.

UNLAWFUL ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAM

Outcome for the Union Worker

If this Court denies review of the State court, LDOL must enforce a judgment by the State courts that, *for unemployment compensation qualification purposes*, provides that:

> a. expiration of contract of employment is irrelevant for determination of an unemployment compensation claim as to cause of unemployment for union workers (but not irrelevant for non-union workers).
>
> b. the concepts of definitions of "employment" and "unemployment" and questions as to whether claimant is performing services for remuneration are to be ignored when a union worker files an unemployment compensation claim.
>
> c. the provisions of the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), the sole governing bodies of federal law for administration and certification of any State unemployment compensation program, for concepts of definitions of "employment" and "unemployment", which require performance of services for remuneration, are disregarded, and instead the concepts under the definition of "employee" and "strike" under the National Labor Relations Act (NLRA), a body of federal law that is separate and distinct from FUTA and SSA and which does not require performance of services for remuneration, is applied for determination of benefits under such program for union-affiliated claimants.

CONCLUSION

The petition for a writ of certiorari should be granted, as the State court has decided an important question of federal law which has not, but should be settled by this Court and which conflicts with constitutional and statutory law.

Respectfully submitted,

DENISE ANN NAGEL, La. Bar #8743*
Senior Attorney
Office of the Secretary
Louisiana Department of Labor
P.O. Box 94094
1001 North 23rd Street
Baton Rouge, Louisiana 70804-9094
Phone: (504) 342-3044
Facsimile: (504) 342-7593
**Counsel of Record*

VIRGINIA GERACE BENOIST, La. Bar #22256
Assistant Attorney General
Louisiana Department of Justice
P.O. Box 94094
1001 North 23rd Street
Baton Rouge, Louisiana 70804-9094
Phone: (504) 342-7557
Facsimile: (504) 342-7593

APPENDIX

STATE OF LOUISIANA
APPEALS TRIBUNAL
FOR THE
OFFICE OF EMPLOYMENT SECURITY
POST OFFICE BOX 94094
BATON ROUGE, LOUISIANA 70804

DECISION OF ADMINISTRATIVE LAW JUDGE

CLAIMANT	EMPLOYER
HARRY ABADIE, JR. ROUTE 2, BOX 1145 RESERVE, LA 70084	BAYOU STEEL CORPORATION P. O. BOX 5000 LAPLACE, LA 70069

DOCKET NUMBER:	H 550 AT 93
S.S. NUMBER:	435 27 3290
AREA OFFICE:	LAPLACE
APPEAL FILED:	MAY 11, 1993
DECISION MAILED:	JULY 9, 1993

ISSUE

DISQUALIFICATION FOR BENEFITS –
R. S. 23: 1601 (2) and 1601 (4)

CASE HISTORY

The Louisiana Office of Employment Security determined on April 21, 1993, that the claimants were disqualified from receipt of unemployment insurance benefits

effective March 21, 1993. The Agency issued redeterminations on May 4, 1993, reversing the disqualification and allowing benefits effective March 20, 1993, because " . . . additional available information indicate[d] that work may not be available . . . " at the place of employment. From these redeterminations, the employer appealed.

The Administrative Law Judge conducted a hearing in the Job Service Office in Metairie, Louisiana, on Monday, May 24, 1993. Mr. H. Mark Adams and Mr. Howard E. Sinor, Jr., attorneys, represented the employer-appellant. Mr. Jon Flanagan, Director of Risk Management, Compensation and Benefits, appeared as a witness for the company and offered testimony. Mr. Louis L. Robein, Jr., attorney, represented the claimants. Mr. Ronald Ferraro, Mr. Kinley Porter and Mr. James Pepitone appeared as potential witnesses.

The hearing reconvened on Wednesday, May 26, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present with the addition of Mr. Henry Vasquez, Vice-President for Human Resources, who appeared to testify for the employer-appellant. Mr. Ronald Ferraro also testified.

The hearing reconvened on Monday, June 14, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present. In addition, Mr. Patrick Gaffney, Vice-President and staff attorney for Hibernia National Bank, was present to file a motion to quash a witness subpoena and a subpoena duces tecum issued to Mr. S. John Castellano, Vice-President of Hibernia National Bank. The

employer-appellant joined in the motion. The Administrative Law Judge did not rule on the motion but simply agreed to reissue the subpoenas in accordance with banking statutes governing subpoenas for bank officials and bank documents. Mr. Ronald Ferraro testified again.

The hearing reconvened on Monday, June 28, 1993, in the Job Service Office in Metairie, Louisiana. The same persons were present with the addition of Mr. S. John Castellano, Vice-President for Commercial Banking for Hibernia National Bank, who testified.

All parties had received written notice that an additional issue would be considered, that being whether claimants were discharged from employment and whether discharge was for misconduct connected with the employment pursuant to the provisions of R. S. 23: 1601 (2).

Since ten days written notice of the hearing date and location and the issues was not given, both parties agreed to waive the right to ten days written notice.

FINDINGS OF FACT

The claimants were all employed in various capacities by the named employer at their location in La Place, Louisiana, under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of them had worked the full six-year term of the agreement effective March 1, 1987, through February 28, 1993.

Discussions regarding a new contract began on January 15, 1993. After two months of negotiations, the claimants

authorized the union bargaining committee on February 24, 1993, to call a strike if an agreement could not be reached, and the union promptly advised the employer of the vote in favor of a strike. The union agreed to give the employer 48 hours notice of a called strike.

Negotiations continued, but no settlement was reached. On March 19, 1993, the union advised the employer that it would begin a strike on March 21, 1993.

On March 20, 1993, the employer made another offer which they considered their "last ditch" effort to avert a strike. They informed the union that *if* the offer was rejected by the membership, the employer would determine that impasse had been reached and that the conditions of the March 19, 1993, offer would be imposed. Without even presenting it to the membership for a vote, the union bargaining committee advised the employer that the offer was rejected and that the strike would proceed.

The employer, through conversations between company officials Richard Gonzalez and Howard Myers and banking officer John Castellano, advised Hibernia National Bank that there was no need to worry about their outstanding loans even though the employer had lost several million dollars in the last two years. They indicated that they could run the plant with new hires and returning strikers until a settlement could be reached. Mr. Castellano gathered from these conversations that new hires were not going to be terminated at the end of the strike, but he did not know what plans the employer had for deciding which returning strikers would be put back to work. In addition, he gathered from several of these

conversations that the employer hoped to negotiate a contract which would result in increased productivity and would cause the company to achieve about four million dollars in profit during the next year.

The strike began on March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and by walking the picket lines. Some of the union members did not go out on strike, and a few have crossed the picket lines and returned to work. About 122 strike replacement workers have been hired and are also crossing the picket lines to work. They have been told by the employer that they have low seniority status and are subject to being replaced by claimants when the strike ends. All of the workers are being paid and are receiving benefits in accordance with the expired labor contract. Although the employer threatened to declare impasse and impose the conditions of the March 19, 1993, offer, they have not done so.

While it is possibly the intention of the employer to discharge some strikers who are considered to have acted inappropriately on the picket lines, no criteria for these dismissals has been developed, and no workers have been discharged.

OPINION

R.S. 23:1601 (2) provides that an individual shall be disqualified for benefits (a) if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Misconduct means mismanagement of a position of employment by action or inaction, neglect that places in

> jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law a violation of a policy or rule adopted to insure orderly work or the safety of others. Such disqualification shall continue until such time as the claimant can requalify by demonstrating that he: (i) has been paid wages for work subject to the Louisiana Employment Security Law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying separation occurred and (ii) that he has not left his last work under disqualifying circumstances.

No employees have been discharged or permanently replaced by new hires. No allegations of any misconduct has been made by the employer. This section of law does not apply and cannot be used to disqualify the claimants for unemployment insurance benefits.

While I personally believe that workers who have been permanently replaced by strike replacements should not be disqualified for unemployment insurance benefits, the Louisiana courts have consistently rejected this idea. *Associated Grocers, Inc. v. Administrator,* 496 So. 2d 450, 452 La. App. 1st Cir.) *writ denied,* 497 So. 2d 1389 (La. 1986); *Standard Materials, Inc., v. Administrator, Div. of Employment Security, Department of Labor,* 401 So. 2d 400, 401 (La. App. 1st Cir. 1981).

> R.S. 1601 (4) provides that an individual shall be disqualified for benefits for any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was

> last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purpose of this Subsection, if separate branches of work which are commonly conducted as separate business in separate premises, are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

The claimants are actively participating in a labor dispute at their place of employment. They are certainly interested in the outcome of the labor dispute. *Vancouver Plywood Co., Inc., v. Sumrall,* 415 So. 2d 625 (La. App. 3d Cir. 1982); *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

Negotiations toward a contract continue. Impasse has not been declared. The employer has not unilaterally imposed any new working conditions, rates of pay or benefit schedules on those workers who continue employment, union members or not. The conditions which occurred in *Greyhound Lines, Inc., v. Strong,* No. 79525, 22d JDC (La. Dist. Ct., August, 1985) are not present in this case.

The claimants have not been locked out of the plant, so they cannot claim that exemption from the labor dispute disqualification. *National Gypsum Company v. Administrator,* 313 So 2d 230, 233 (La. 1975).

The evidence adduced at the hearing(s) clearly shows that the Agency redetermination is in error and that the

claimants must be disqualified for unemployment insurance benefits.

IT IS ORDERED That, since R. S. 23: 1601 (2) does not apply, no disqualification for unemployment insurance benefits be assessed under this section of law.

IT IS FURTHER ORDERED That the Agency redeterminations which did not disqualify the claimants for unemployment insurance benefits pursuant to the provisions of R. S. 23: 1601 (4) be reversed and the claimants disqualified effective March 21, 1993.

/s/ Dennis W. Dykes, Sr.
DENNIS W. DYKES, SR.
CHIEF ADMINISTRATIVE
LAW JUDGE

dwd

REOPENING OF HEARING: IF EITHER PARTY FAILS TO APPEAR FOR A HEARING, THE JUDGE *MAY*, UPON GOOD CAUSE SHOWN, REOPEN AND RESCHEDULE THE HEARING. THE REQUEST MUST BE IN WRITING AND MAILED OR DELIVERED TO THE OFFICE WHERE THE APPEAL WAS FILED OR TO THE JUDGE WHOSE NAME AND ADDRESS APPEAR ON THE NOTICE OF HEARING WITHIN SEVEN (7) DAYS OF THE DATE THE DECISION OF THE JUDGE WAS MAILED. IF THE REQUEST IS DENIED, IT WILL *NOT* BE FORWARDED TO THE LOUISIANA BOARD OF REVIEW AS AN APPEAL TO THE DECISION OF ADMINISTRATIVE LAW JUDGE.

FURTHER APPEAL RIGHTS: THIS DECISION BECOMES FINAL UNLESS AN APPEAL IS FILED WITH

THE LOUISIANA BOARD OF REVIEW, P. O. BOX 94094, BATON ROUGE, LOUISIANA 70804-9094, OR WITH THE LOCAL EMPLOYMENT SECURITY OFFICE IN YOUR AREA WITHIN FIFTEEN (15) DAYS AFTER THE MAILING DATE SHOWN. THE APPEAL SHOULD LIST DETAILED REASONS WHY IT IS BELIEVED THAT THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IS INCORRECT. IF YOU EXERCISE FURTHER APPEAL RIGHTS, CONTINUE TO FILE YOUR CLAIM FOR BENEFITS WEEKLY.

STATE OF LOUISIANA

BOARD OF REVIEW
FOR THE
OFFICE OF EMPLOYMENT SECURITY
POST OFFICE BOX 94094
BATON ROUGE, LOUISIANA 70804-9094

DECISION OF BOARD OF REVIEW

CLAIMANT	EMPLOYER
Ferraro Ronald et al 133 Somerset LaPlace, LA 70068-5209	Bayou Steel Corporation P. O. Box 5000 LaPlace, LA 70069

S.S.NUMBER: 439 82 4936

BOARD DOCKET NUMBER:	1904 BR 93
APPEALS DOCKET NUMBER:	H 0550 AT 93
AREA OFFICE:	LaPlace
APPEAL FILED DATE:	MAY 11, 1993
DECISION MAILED:	AUG 04 1993

ISSUES

DISQUALIFICATION FOR BENEFITS – R.S.23:1601(4)
DISQUALIFICATION FOR BENEFITS – R.S.23:1601(2)

CASE HISTORY

This case came before the Louisiana Board of Review upon an appeal timely filed by the claimants, through their legal representative, Louis L. Robein, Jr. The appeal is a result of a decision rendered by Chief Administrative Law Judge Dennis W. Dykes, Sr., on July 9, 1993. In his decision, Judge Dykes ordered that LSA-R.S. 23:1601(2)

did not apply to the case, and there should be no disqualification assessment pursuant to that Section of Law. Judge Dykes further ordered that the redeterminations issued by the Agency, which did not disqualify the claimants for unemployment insurance benefits pursuant to LSA-R.S. 23:1601(4) be reversed, and the claimants be disqualified for benefits effective March 21, 1993.

EVIDENCE

The claimants worked for the employer under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of the claimants worked the full six-year term of the agreement, March 1, 1987 through February 28, 1993.

Discussions regarding a new contract began January 15, 1993. A strike authorization vote was given by the union membership on February 24, 1993. The union notified the employer of the strike authorization vote. The employer made preparations in case a strike occurred; those preparations included planning to hire replacements for striking employees.

The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993. Negotiations continued; a settlement could not be reached.

March 19, 1993 the union and company met. The union refused to agree to another extension of the expiring contract; the union did agree to give the employer 48 hours notice of a called strike. Approximately two hours

later, the union advised the employer that it would begin a strike on March 21, 1993.

March 20, 1993 the employer made a "last ditch" offer in an effort to avert a strike. They informed the union that if the offer was rejected by the membership, the employer would determine that an impasse had been reached and that the conditions of the March 19, 1993 offer would be imposed. The union bargaining committee, having been authorized by the membership vote on February 24, 1993, rejected the offer and advised the employer that the strike would proceed. An impasse was not declared.

The strike began March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and/or by walking the picket lines.

Some of the union members did not go out on strike, but rather reported for work immediately as scheduled. Some of the union members who did initially participate in the strike by refusing to work, have since crossed the picket lines and returned to work. Approximately 122 strike replacement workers have been hired and are also crossing the picket lines to work.

The employer has not unilaterally imposed new working conditions. The employer is voluntarily adhering to the expired contract in rates of pay, benefit schedules, etc., on those workers who continue employment, union or not. Claimant Ferraro asserts that the employer is sub-contracting truck driver jobs (approximately 24 jobs affected) in violation of the expired contract.

OPINION

R.S.23:1601(2) provides that an individual shall be disqualified for benefits if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Such disqualification shall continue until such time as the claimant (a) can demonstrate that he has been paid wages for work subject to the Louisiana Employment Security law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying act occurred and (b) has not left his last work under disqualifying circumstances. In addition, if the administrator finds that such misconduct has impaired the right, damaged or misappropriated the property of, or has damaged the reputation of a base period employer, then the wage credits earned by the individual with the employer shall be canceled, and no benefits shall be paid on the basis of wages paid to the individual by such employer.

R.S.23:1601(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the

same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

There is no testimony or evidence indicating that the claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

There is no testimony or evidence indicating that the claimants have "quit" their employment with Bayou Steel Corp., as alleged in their memorandum to the Board of Review. To the contrary, the claimants have provided written statements indicating that they are unemployed as a result of a labor dispute. This is substantiated by the testimony of Claimant Ferraro who stated " . . . we had no alternative but to go on strike . . . " Further, the employer has received no notices of resignation, nor has the Department of Labor (agency) been advised by these claimants that they have subsequently "quit".

The Unemployment Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no fault of his own should be entitled to unemployment benefits. Thus, the disqualification provision of LSA-R.S. 23:1601 (4) must be regarded as an expression of public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to

either labor or management, as they seek to resolve their differences. See *Piggly Wiggly v. Gerace,* 370 So. 2d 1327 (La. App. 2d Cir. 1979).

The Louisiana Employment Security Law requires the employer to pay substantial sums into a fund from which unemployment compensation benefits are paid. The employee contributes nothing to this fund. Avoiding placing an employer in a position of being compelled by statute to subsidize a strike undoubtedly was one of the reasons which prompted the Legislature to disqualify those who are participating in or interested in a labor dispute, and we consider that a broad disqualification was intended by those categories. See *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

The burden is on the employee to prove that he comes within the exceptions to disqualification by showing that he is neither participating in nor interested in the dispute. See *Senegal v. Lake Charles Stevedores, Inc.,* 197 So. 2d 648 (La. 1967).

In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations of a new contract continued. Rather, the claimants elected to strike. There has been no lockout, nor has there been an impasse.

Due to the aforementioned, it must be concluded that the claimants are unemployed as a result of a labor dispute in active progress at the premises at which they were last employed. Further, as the claimants continue in their refusal to cross the picket lines and their refusal to

return to work, it must be concluded that these claimants are participating in and interested in the labor dispute. For these reasons, the claimants are not entitled to Unemployment Insurance Benefits.

IT IS ORDERED that the decision of the Administrative Law Judge, assessing a disqualification for benefits pursuant to LSA-R.S. 23:1601(4), effective March 21, 1993, be affirmed.

LOUISIANA BOARD OF REVIEW

/s/ Gordon Flory
GORDON FLORY, CHAIRMAN

/s/ Basil Ball
BASIL BALL,
VICE-CHAIRMAN

/s/ Emery Villar
EMERY VILLAR,
BOARD MEMBER

/s/ Herman Muse
HERMAN MUSE,
SECRETARY

DID NOT PARTICIPATE
IN THIS DECISION
RAY FREDLUND,
BOARD MEMBER

fd

FURTHER APPEAL RIGHTS: This decision becomes final unless an appeal is filed in the district court in the parish where the claimant resides, or last resided, within fifteen (15) days after the mailing date of this decision. If you exercise further appeal rights and are unemployed, continue to file your claim for benefits weekly.

HARRY ABADIE, JR. et al.

versus

BAYOU STEEL CORPORATION et al.

40TH JUDICIAL DISTRICT COURT

PARISH OF ST. JOHN THE BAPTIST

STATE OF LOUISIANA

NO. 31,262, DIVISION C

JUDGMENT

(Filed Dec. 28, 1993)

This matter was submitted for decision, in accordance with the court's order of December 6, 1993, at 5 p.m. December 20, 1993, with leave nevertheless to file additional briefs by 2 p.m. December 23, and additional briefs were filed. Counsel for the parties were Louis L. Robein, Jr. for claimants; Howard B. Sinor, H. Mark Adams and Katy Kimbell Theriot for the employer; and Denise A. Nagel and Virginia Gerace Benoist for the Secretary of Labor.

For the written reasons this day assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that the decision of the Louisiana Board of Review is AFFIRMED.

Judgment rendered and signed at Edgard, Louisiana, December 28, 1993.

/s/ William V Redmann
WILLIAM V. REDMANN,
JUDGE AD HOC

HARRY ABADIE, JR. et al.	40TH JUDICIAL DISTRICT COURT
versus	PARISH OF ST. JOHN THE BAPTIST
BAYOU STEEL CORPORATION et al.	STATE OF LOUISIANA
	NO. 31,262, DIVISION C

REASONS FOR JUDGMENT

(Filed Dec. 28, 1993)

Harry Abadie, Jr. and others apply for judicial review to reverse a decision of the Louisiana Board of Review affirming their disqualification for unemployment insurance benefits. That disqualification had been determined by Chief Administrative Law Judge Dennis W. Dykes, Sr., reversing an administrative redetermination that had held applicants not disqualified by La. R.S. 23:1601(4).

La. R.S. 23:1634 provides for judicial review of the Board's decisions, and it specifies that in any such judicial review,

> "the findings of the Board of Review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."

I have read the entire 390-page transcript of the testimony before the administrative law judge, and have considered the many exhibits and administrative records referred to therein. I have also studied at length the very thoughtful memoranda submitted by counsel for the claimants, for the employer, and for the Secretary of Labor, together with additional memoranda in response.

I conclude that there is sufficient evidence for the Board's findings of fact, and that those findings are therefore conclusive, as the quoted law provides.

I also conclude that the Board correctly applied the law on disqualification for benefits, namely La. R.S. 23:1601. That law disqualifies a claimant

> "(4) For any week with respect to which . . . his unemployment is due to a labor dispute in active progress at the . . . premises at which he is or was last employed; but such disqualification shall not apply if it is shown . . . that he is not participating in or interested in the labor dispute which caused his unemployment."

Considering the Board's sufficiently supported findings that claimants' unemployment was due to the labor dispute in progress and that claimants have not shown that they are not participating in or interested in that labor dispute, and considering the plain language of the quoted law, and considering but notwithstanding the thorough and insightful arguments to the contrary by the claimants and by the Secretary, this court concludes it has no alternative on judicial review but to affirm the Board's decision.

Edgard, Louisiana, December 28, 1993.

/s/ William V Redmann
WILLIAM V. REDMANN,
JUDGE AD HOC

HARRY ABADIE, JR., ET AL	40TH JUDICIAL DISTRICT COURT
VS. NO. 31,262 DIVISION "C"	PARISH OF ST. JOHN THE BAPTIST
BAYOU STEEL CORPORATION, ET AL	STATE OF LOUISIANA

YOU ARE HEREBY NOTIFIED that on the 28th day of December, 1993, Judgment was rendered in the above numbered and entitled matter, a certified copy of which said Judgment is annexed hereto and made part hereof.

WITNESS MY OFFICIAL HAND AND SEAL OF OFFICE AT EDGARD, LOUISIANA ON THIS 3rd DAY OF January, 1994.

/s/ Lynn D. Caronna
DY. CLERK OF COURT

I hereby certify that a copy of the foregoing notice was this day mailed by me to the following counsel of record for all parties and to such of the litigants, if any, who are not represented by counsel which notices were addressed to them, respectively at their last known address, with postage prepaid.

DENISE A NAGEL
VIRGINIA GERACE BENOIST
P. O. Box 94094
1001 North 23rd STreet
BAton Rouge, La 70804

LOUIS L. ROBEIN, JR.
2540 Severn Ave., Ste. 400
Metairie, La 70002

H. MARK ADAMS
HOWARD E. SINOR, JR.
KATY KIMBELL THERIOT
201 St. Charles Avenue
New Orleans, La 70170

/s/ Lynn D. Caronna
DY. CLERK OF COURT

HARRY ABADIE, JR., ET AL.	NO. 94-CA-322
VERSUS	COURT OF APPEAL
BAYOU STEEL CORPORATION AND HONORABLE GAYLE F. TRULY, SECRETARY OF LABOR	FIFTH CIRCUIT STATE OF LOUISIANA

APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 31, 262, DIVISION "c"
HONORABLE WILLIAM REDMANN

JOHN C. BOUTALL
JUDGE PRO TEMPORE

OCTOBER 25, 1994

Court composed of Judges Thomas C. Wicker, Jr., James L. Cannella and John C. Boutall, Pro Tempore

LOUIS L. ROBEIN, JR.
2540 Severn Avenue, Suite 400
Metairie, Louisiana 70002
ATTORNEY FOR PLAINTIFF/APPELLANT,
HARRY ABADIE, JR.

H. MARK ADAMS
KATY KIMBELL THERIOT
Jones, Walker
201 St. Charles Avenue, 49th Floor
New Orleans, LA 70170-5100
ATTORNEYS FOR DEFENDANT/APPELLEE,
BAYOU STEEL CORPORATION

DENISE ANN NAGEL
1001 N. 23rd Street
P. O. Box 94094
Baton Rouge, LA 70804-9094
ATTORNEY FOR DEFENDANT/APPELLEE,
LOUISIANA DEPARTMENT OF LABOR

AFFIRMED.

This case involves claims for unemployment compensation. The plaintiffs are employees of Bayou Steel Corporation. They filed suit in the 40th Judicial District to contest a determination by the Administrative Review Board that they were excluded from collecting benefits under La. R.S. 23:1601(4) as active members of a strike. Named as defendants in the suit were Bayou Steel and Honorable Gayle F. Truely, Secretary of Labor. The decision of the Review Board was affirmed by the trial court and both the plaintiffs and the Honorable Gayle F. Truely have appealed to this court for review. We likewise affirm the decision of the review panel.

The plaintiffs are employees of Bayou Steel Corporation and members of the United Steel Workers of America. These employees were working under a six year contract which expired on February 28, 1993. The union and the company failed to successfully negotiate a new contract and the union called a strike which began on March 21, 1993. All of the claimants herein have participated in the strike by refusing to return to work and/or walking the picket line.

In April of 1993, the employees filed their claims for unemployment compensation. Bayou Steel opposed the claims, alleging that claimants were disqualified from

receiving benefits under La. R.S. 23:1601(2) (employee misconduct) and La. R.S. 23:1601(4) (employees who are actively participating in or who are interested in an ongoing labor dispute). On April 21, 1993, the Administrator made an initial determination disqualifying claimants from receiving benefits. Subsequently, on May 4, 1993, the Administrator issued a Non-monetary Determination which reversed his prior decision and found that the claimants were entitled to unemployment benefits.

Bayou Steel Corporation appealed and the matter was presented to Administrative Law Judge Dennis Dykes. After a hearing, he found that La. R.S. 23:1601(2) was inapplicable to this case. He further found that claimants were actively participating in an ongoing strike and therefore they were disqualified from receiving benefits under La. R.S. 23:1601(4).

The claimants appealed to the Board of Review, which affirmed the decision of the Administrative Law Judge. The board articulated its findings of fact and applications of law as follows:

> The claimants worked for the employer under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of the claimants worked the full six-year term of the agreement, March 1, 1987 through February 28, 1993.
>
> Discussions regarding a new contract began January 15, 1993. A strike authorization vote was given by the union membership on February 24, 1993. The union notified the employer of the strike authorization vote. The employer

made preparations in case a strike occurred; those preparations included planning to hire replacements for striking employees.

The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993. Negotiations continued; a settlement could not be reached.

March 19, 1993 the union and company met. The union refused to agree to another extension of the expiring contract; the union did agree to give the employer 48 hours notice of a called strike. Approximately two hours later, the union advised the employer that it would begin a strike on March 21, 1993.

March 20, 1993 the employer made a "last ditch" offer in an effort to avert a strike. They informed the union that if the offer was rejected by the membership, the employer would determine that an impasse had been reached and that the conditions of the March 19, 1993 offer would be imposed. The union bargaining committee, having been authorized by the membership vote on February 24, 1993, rejected the offer and advised the employer that the strike would proceed. An impasse was not declared.

The strike began March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and/or by walking the picket lines.

Some of the union members did not go out on strike, but rather reported for work immediately as scheduled. Some of the union members who did initially participate in the strike by refusing to work, have since crossed the picket

lines and returned to work. Approximately 122 strike replacement workers have been hired and are also crossing the picket lines to work.

The employer has not unilaterally imposed new working conditions. The employer is voluntarily adhering to the expired contract in rates of pay, benefit schedules, etc., on those workers who continue employment, union or not. Claimant Ferraro asserts that the employer is sub-contracting truck driver jobs (approximately 24 jobs affected) in violation of the expired contract.

OPINION

R.S. 23:1601(2) provides that an individual shall be disqualified for benefits if the Administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. Such disqualification shall continue until such time as the claimant (a) can demonstrate that he has been paid wages for work subject to the Louisiana Employment Security law or to the unemployment insurance laws of any other state or of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying act occurred and (b) has not left his last work under disqualifying circumstances. In addition, if the administrator finds that such misconduct has impaired the right, damaged or misappropriated the property of, or has damaged the reputation of a base period employer, then the wage credits earned by the individual with the employer shall be cancelled, and no benefits shall be paid on the

basis of wages paid to the individual by such employer.

R.S. 23:1601(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

There is no testimony or evidence indicating that the claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed.2d 614 (1967).

There is no testimony or evidence indicating that the claimants have "quit" their employment with Bayou Steel Corp., as alleged in their memorandum to the Board of Review. To the contrary, the claimants have provided written statements indicating that they are unemployed as a result of a labor dispute. This is substantiated by the testimony of Claimant Ferraro who

stated " . . . we had no alternative but to go on strike . . . " Further, the employer has received no notices of resignation, nor has the Department of Labor (agency) been advised by these claimants that they have subsequently "quit".

The Unemployment Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no fault of his own should be entitled to unemployment benefits. Thus, the disqualification provision of LSA-R.S. 23:1601 (4) must be regarded as an expression of public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to either labor or management, as they seek to resolve their differences. See *Piggly Wiggly v. Gerace*, 370 So. 2d 1327 (La. App. 2d Cir. 1979).

The Louisiana Employment Security Law requires the employer to pay substantial sums into a fund from which unemployment compensation benefits are paid. The employee contributes nothing to this fund. Avoiding placing an employer in a position of being compelled by statute to subsidize a strike undoubtedly was one of the reasons which prompted the Legislature to disqualify those who are participating in or interested in a labor dispute, and we consider that a broad disqualification was intended by those categories. See *Senegal v. Lake Charles Stevedores, Inc.*, 197 So. 2d 648 (La. 1967).

The burden is on the employee to prove that he comes within the exceptions to disqualification by showing that he is neither participating

in nor interested in the dispute. See *Senegal v. Lake Charles Stevedores, Inc.*, 197 So. 2d 648 (La. 1967).

In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations of a new contract continued. Rather, the claimants elected to strike. There has been no lockout, nor has there been an impasse.

Due to the aforementioned, it must be concluded that the claimants are unemployed as a result of a labor dispute in active progress at the premises at which they were last employed. Further, as the claimants continue in their refusal to cross the picket lines and their refusal to return to work, it must be concluded that these claimants are participating in and interested in the labor dispute. For these reasons, the claimants are not entitled to Unemployment Insurance Benefits.

These findings were affirmed by the 40th Judicial District Court. In its reasons for judgment, the trial court stated:

Considering the Board's sufficiently supported findings that claimants' unemployment was due to the labor dispute in progress and that claimants have not shown that they are not participating in or interested in that labor dispute, and considering the plain language of the quoted law, and considering but notwithstanding the thorough and insightful arguments to the contrary by claimants and by the Secretary, this court concludes it has no alternative on

judicial review but to affirm the Board's decision.

Both the claimants and the Department of Labor, through its Secretary, the Honorable Gayle F. Truely allege that the evidence is insufficient to support the decision of the Board of Review and that the decision is incorrect as a matter of law. Both further request that, in the alternative, this matter should be remanded for the taking of evidence on matters which occurred after the hearing before Administrative Law Judge Dykes. In addition, the Department of Labor argues that the present state jurisprudence violates state statutory and constitutional law; jeopardizes public policy and favors an exclusive remedy in favor of the employer against the employee.

At the onset, it is important to note the standard of review by which we are bound in matters of this kind. La. R.S. 23:1634 provides in part that "In any proceeding under this section the findings of the board of review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."

There must be legal and competent evidence to support the factual findings on which the administrative determination turns. *Banks v. Administrator of Dept. of Labor,* 393 So.2d 696 (La. 1981). Judicial review of the findings of the Board of Review does not permit the weighing of evidence, drawing of inferences, reevaluation of evidence or substituting the views of the court for that of the Board of Review as to the correctness of the

facts presented. *Dupont v. Blanche*, 514 So.2d 286 (La.App. 5 Cir.1987).

In this case, after a careful review of the record, we believe that the findings of the review panel are supported by sufficient evidence and, therefore, we are bound by these findings. Plaintiffs allege that company actions threatening new working conditions, reductions in pay and termination of an undisclosed number of employees for strike misconduct constituted a "lock out" thereby making them eligible for unemployment benefits. The Board of Review found, however, that these changes were not made and that the plant was currently working under the terms of the expired contract pending a resolution of the labor dispute, and the actions of Bayou Steel did not constitute a lockout.

Plaintiffs and the Department of Labor also argue that Bayou Steel's actions in hiring replacement workers for an indefinite time operates as a discharge of the striking employees, and makes them eligible for benefits. This argument was rejected by the First Circuit in *Associated Grocers v. Adm'r of Employment Sec.*, 496 So.2d 450, 451-2 (La.App. 1 Cir.1986) *writ denied* 497 So.2d 1389 (La.1986):

> After reviewing the record of the instant case as a whole, we find that the trial court was correct in determining that the agency incorrectly applied the law. The claimants became unemployed because of a labor dispute. Even assuming that all the claimants were permanently replaced as of June 20, 1983, jurisprudence states that such action does not constitute a cessation of the labor dispute or the claimants'

participation or interest in the dispute within the meaning of LSA-R.S. 23:1601 (4). See *Elmer Candy Corp.*, 286 So.2d [423, 427-8 (La.App. 1 Cir.1973)]. Since the labor dispute itself had not ended, in order to obtain unemployment compensation benefits, it is incumbent upon the claimants to show that they were not participating in or interested in the labor dispute which caused their unemployment. *Senegal*, 197 So.2d [648, 651 (La.1967)]. The evidence in the record does not support the Board of Review's finding of disinterest.

The record shows that, at the time of the hearing, the claimants were no longer picketing, but that they were still members of the striking union, that they had picketed until they sought unemployment benefits, that at least one of them still would not cross established picket lines, that some of them were still passing out leaflets encouraging a boycott of the plaintiff, and that they had not asked to be reinstated although they claimed to be available for work either at plaintiff's establishment or elsewhere. The record also shows that there is no evidence that any of the claimants have been discharged by the plaintiff. In accordance with federal law, they continued to have the right to reinstatement upon application, as jobs became available. As expressed in *Elmer Candy Corp.*, 286 So.2d at 428, "as Union members, it could not be said that they were not interested in the labor dispute that they had originated, and which caused their unemployment." After a careful review of the record, we agree with the trial court that the claimants have not proven their lack of participation or interest in an ongoing labor dispute.

In this case, plaintiffs likewise have failed to show that they are no longer participating in or interested in the ongoing labor dispute with Bayou Steel Corporation. We are in agreement with our brethren on the First Circuit and, therefore, we find no error of law in the ruling of the Board of Review and the affirmation of same by the trial court that the plaintiffs were actively involved in a labor dispute and were disqualified from receiving unemployment benefits pursuant to La. R.S. 23:1601(4).

Both appellants next request that should this Court fail to reverse the decision of the Board of Review and of the district court, this matter should be remanded for the taking of evidence concerning the actions of Bayou Steel after the original hearing in this matter. These actions, it is argued, show that Bayou Steel is not in good faith in these labor negotiations and, therefore, there is no bona fide labor dispute within the meaning of La. R.S. 23:1601(4).

Appellants argue that a remand is necessary because (1) the identities of the workers to be terminated for strike misconduct has been revealed by Bayou Steel; and (2) the National Labor Relations Board has charged Bayou Steel with serious "law violations" which reflect issue of Bayou's good faith or lack thereof in negotiating with plaintiffs. We find that these allegations are not such as to warrant a remand in this case. There is no evidence to suggest that, at this time, any claimant has been terminated from employment and, therefore, all the claimants are employees actively involved in or interested in the labor dispute within the meaning of La. R.S. 23:1601(4). Second, any alleged violations of the National Labor Relations Act are separate and distinct from the issue of

whether the employees herein are entitled to unemployment compensation benefits and therefore are not relevant. Third, the claimants have made a claim based upon the facts at a particular time. If these facts have changed now, they form the basis for another claim. Otherwise, this claim would never be subject to final adjudication.

As stated supra, the Department of Labor also argues that existing Louisiana jurisprudence operates to violate state constitutional and statutory law and is in derogation of public policy. Basically, the department alleges that allowing the company to hire replacement workers, without granting the employees the right to collect unemployment benefits, tips the "balance of power" in favor of the company and unfairly prejudices the employees.

In *National Gypsum Co. v. Administrator, Dept. of Emp. S.*, 313 So.2d 230, 233 (La.1975), the Louisiana Supreme Court articulated the public policy behind La. R.S. 23:1601(4): "We thus regard the disqualification provision of La. R.S. 23:1601(4) as an expression of the public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to either labor or management, as they seek to resolve their differences." We adhere to this policy, pointing out, however, that the facts of National Gypsum and of this case are markedly different.

It has also been recognized that " . . . the intent of LSA-R.S. 23:1601(4) is undoubtedly to avoid placing an employer in a position of being compelled by state statute to subsidize a strike since the employer is required to pay substantial sums into a fund from which unemployment benefits are paid." *Cities Service v. Admin., La. Dept. of*

Emp., 383 So.2d 1315, 1318 (La.App. 3 Cir.1980); *Mascair v. Blanche*, 484 So.2d 190 (La.App. 5 Cir.1986).

We recognize that strikers who are disqualified from receiving benefits may be placed in a difficult financial position pending the resolution of an ongoing labor dispute. However, we do not believe that this hardship creates a violation of state statutory or constitutional law.

For the above discussed reasons, the findings of the Board of Review and the judgment of the 40th Judicial District Court upholding those findings are affirmed. All costs of this appeal are assessed against plaintiffs/appellants. See La. R.S. 13:5112(D).

AFFIRMED

THE SUPREME COURT OF THE STATE OF LOUISIANA

HARRY ABADIE, JR., ET AL

VS.

NO. 94-C - 2857

BAYOU STEEL CORPORATION AND HONORABLE GAYLE F. TRULY, SECRETARY OF LABOR

IN RE: Labor Department of; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. John Baptist 40th Judicial District Court Div. "C" Number 31,262; to the Court of Appeal, Fifth Circuit, Number 94-CA-0322

February 3, 1995

Denied.

CDK

WFM

JCW

HTL

BJJ

JPV

DENNIS, J. not on panel.

Supreme Court of Louisiana
February 3, 1995

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

Respondent Claimant Parties

HARRY ABADIE, JR.
KERN T. ADAMS
LARRY ADZICH
CHARLES ALEXANDER
FRANK ALEXIS, SR.
MICHAEL AMBROSE
JOHNELL ANDERSON
OSTON ANDERSON
ROLAND ANDERSON
RUSSELL ANDERSON
SALVADOR J. ARCURI
SHEILA ARMSTRONG
JOSEPH R. AUCOIN
LEROY BAILEY, JR.
WAYNE BANKSTON
BARRY BARRIOS
MELVIN BATISTE
HERMAN BATTISTE
JERRY P. BECNEL
DANIEL C. BENNETT
LINDA BERGERON
DAVID BETER
RANDALL BEYL
LEROY BOSSIER
RICHARD BOUDOIN, SR.
KIM BOUDREAUX
CLIFFORD BOURGEOIS
JIMMY BOURGEOIS
ROBERT BOURGEOIS
RUSSELL BOURGEOIS, JR.
FARON BOWEN
COLBERT BROUSSARD, JR.
LONNIE BROWN
JOSEPH BROWNING
KEVIN BURCH
ROBERT BURNS
CLEM G. CARRIER
BRUCE CARTER
RICHARD CARTER
TIMOTHY M. CASSIDY, SR.
JAMES CATOIRE, JR.
PAUL CHAMPAGNE
MAURICE CHATMAN
PAUL CHAUVIN
TODD J. CHIASSON
THOMAS COLA
PERRY C. CORBETT
EDWARD E. CRAYTON
MARK A CREECY
TALMADGE CROWF, JR.
JIMMY LEE DABBS
JOSEPH D'AGOSTINO
ELTON M. DAILEY
ERNEST DAVIS
RONALD DELANEUVILLE
ERIC J. DELATTE
LARRY D. DENSON, SR.
CARL DESLATTE
TODD DEVARE
SIDNEY DONALDSON
ANTHONY F. DUFRENE
KIM DUHE
ERNEST DUNN, JR.
CRAIG DURONSLET, SR.
ANDREW EALY
SCOTT ELDER
JOHN ELDRIDGE
JOYD ENGLADE
CARDELL EUGENE
CHARLES EUGENE

RHONDA EUGENE
ALLEN FABRE, JR.
NEIL FALCON, JR.
TOMMY FERGUSON
RONALD FERRARO
KENT B. FREDERICKS
MICHAEL FREDERISKEN
RONALD A. FREMIN, JR.
EDWARD GAINES, JR.
PERCY L. GAINES
BARRY GALATAS
BLAINE GARCICH
LEONARD GARDNER
OLIVER W. GAUTHREAUX
CLEMENT GIBSON, JR.
RICKY GREENWALT
RICKY GROWS
HENRY J. GUERET
ALDEN GUIRDY, JR.
ANTIONE P. GUILLORY
JOHN HANNICUTT
STEVEN HARRISON
JACKIE J. HAY
HENRY HAYDEL, JR.
PAUL HAYES
LOUIS HOOVER, JR.
DONALD HORNE
GERALD HOTARD, JR.
TIMMY HEBERT
ELMER IRBY, III
TERRY JENKINS
ANTHONY JOHNSON
DARRELL JOHNSON
MARVIN JOHNSON
SAM JONES, III
WILSON JONES, JR.
RAYMOND JOSEPH, JR.
CHRIS JOUTY
KENNETH KEATING
WADE KELLER
ALVIN KELLY, JR.
JOHN KELLY
PAT KING
LEONARD I. KIRSHNER
JOHN KLUMPP
ARON KNIGHT
CHARLES L. KYZAR
CARL LABORDE
MURPHY LABRANCHE
RAYMOND LACOY
EZEKIEL LANDIX, JR.
TROY LANDRY
CECILIA LANGLEY
ASA LEATHERS
CATHRYN LEBLANC
DAREL LEBOUEF
JOSEPH LESLIE
DARREN LEVET
JOSEPH LEWIS, III
ROBERT JAMES LITTLE
DENNIS J. LOUPE
DARIN J. MADERE
MARGARETTE
MALARCHER
LARRY MARTIN
JOHN D. MAURIN, JR.
JOHN MAUS
JAMES T. MCEARL
KEITH J. MCGEE
MICHAEL MCNABB
MONICA MEALEY
WYADE M. MELANCON

EDWARD MEUNIER
FREDERICK K. MILES
BURTON A. MILLET
DAVID MILLET
RONNIE MILLET
DAVID P. MIRE
THADDEUS MITCHELL
DAVID MONTZ
DONALD NABORS
DANIEL NOEL, JR.
KIRK OCMAND
BRANDT PALMER
JAIMIN G. PANDYA
MARVIN PEA
MCKINLEY PETERSON
LESTER PLAUCHE
LOUIS POLK
KINLEY PORTER
WARREN PROUT
JAMES W. PUISSEGUR
MIKE QUATTROCCHI
CHESTER REESE, JR.
GARNETT RHOADES
DARRIN RHODEN
TERRY L. RICHARD
MONTE RICHARDS
BRYAN RICHOUX
MICHAEL RIXNER
TOMMY RIZZUTO
ALICE ROBERTSON
KEITH J. ROBICHEAUX
KYLE ROBICHEAUX
WILLIAM A. ROSE
CORNELL ROUSSEL
ERIC ROUSSEL
SCOTT A. ROWE
HARRY ROWND
TIMOTHY P. RUSHING
TYRELL SACRA
MICHAEL D. SANDERS
GEORGE SCHEXNAYDER
ROBERT SCHOBEL
JIMMY SEALS
DAVID A. SIMKO, SR.
WARREN SIMMONS
PERRY SIMONEAUX
ALLEN SMITH
STEVEN SMITH
RICHARD D. SOSA
DENNIS SPANO
JOSEPH SPARCELLA
GAYLEN SPENCER
ANTHONY D. SPITALE
TODD ST. PIERRE
HENRY SUTTON
PHILIP W. SUTTON
DAVID TARNOWSKIE
MARION E. THERIOT
WILEY THIBODEAUX
ROBERT A. TORRES, JR.
JOSEPH TREVINO
MICKEY TRICHE
BRYAN TROXCLAIR
DONNY TROXCLAIR
HENRY TYLER, JR.
LAWRENCE VICKNAIR
AMY WAGUESPACK
DAVID M. WAGUESPACK
PAUL WAGUESPACK
HERBERT WALKER
WILLIE L. WALKER
GEORGE WARREN
RONALD WEBER
STEVEN J. WEBER

STEPHEN WEBRE
NORBERT WEINERT, SR.
TODD WEMPREN
TONY WESTERN
HAYWOOD WHITE
CLINT C. WILDES
JOSEPH WILLIAMS
NORMAN WILLIAMS
CLARENCE WILLIFORD
DANIAL WILLIFORD
GILBERT WILSON
JAMES WYSINGLE
ROBERT YARRINGTON
DENNIS YOUNG
CHARLES ZIEGELER
DONALD ZIMMER
PAUL ZERINGUE

PROVISIONS OF CONSTITUTION AND STATUTES
(in pertinent part)

A. Federal

U.S. Const. amend. V – . . . Due Process of Law . . .

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV – Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 USC 3304. Approval of State laws

(a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that – . . .

(c) Certification. – October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved . . . No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2)

with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. . . .

26 USC 3306. Definitions

(c) Employment. – For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him. . . .

29 USC 142. Definitions

. . . (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reasons of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 USC 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . (d) causing diminution of employment and wages in such volume as

substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 USC 152. Definitions

. . . (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .

42 USC 503. State laws

(a) Provisions required

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for –

(1) Such methods of administration. . . . to be reasonably calculated to insure full payment of unemployment compensation when due;

* * *

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

* * *

(9)(b) Failure to comply; payments stopped

Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is –

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. . . .

42 USC 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. . . .

B. State

LSA-Const. Art. 1, § 2. Due Process of Law

Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

LSA-Const. Art. 1 § 3. Right to Individual Dignity

Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

LSA-R.S. 23:1471. Short title; declaration of public policy

. . . As a guide to the interpretation and application of this Chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against the greatest hazard of our economic life. . . .

LSA-R.S. 23:1472. Definitions

(12)(A) "Employment" means . . . any services . . . performed for wages or under any contract of hire, written or oral, express or implied;

(19)(a) "Unemployment" – Any individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him. . . .

LSA-R.S. 23:1601. Disqualification for benefits

An individual shall be disqualified for benefits:

(1)(a) If the administrator finds that he has left his employment from a base period or subsequent employer without good cause attributable to a substantial change made to the employment by the employer. . . .

(2)(a) If the administrator finds that he has been discharged by a base period or subsequent employer for misconduct connected with his employment. . . .

(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Subsection, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the

same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

LSA-R.S. 23:1624. Monetary determination and notice of claim

An agent designated by the administrator shall take the claim. A determination of eligibility made on the basis of base period wage credits shall be made promptly. . . .

LSA-R.S. 23:1627. Determination in labor dispute cases

Whenever any claim involves the application of the provisions of R.S. 23:1601(4) the individual handling the claim shall, if so directed by the administrator, promptly transmit all evidence with respect to such case to the administrator. The administrator or the representatives he may designate shall, on the basis of the evidence submitted and such additional evidence as he may require, make a determination with respect thereto. Such determination shall be the final decision on the claim, unless within fifteen days after the date notification was given or was mailed to a party's last known address, an appeal is filed with an appeal tribunal.

LSA-R.S. 23:1634. Judicial review; procedure

A. Within the time specified in R.S. 23:1630, the administrator, or any party to the proceedings before the board of review, may obtain judicial review thereof by filing in the district court of the domicile of the claimant a

petition for review of the decision, and in such proceeding any other party to the proceeding before the board of review shall be made a party defendant. The petition for review need not be verified but shall state the grounds upon which such review is sought. The administrator shall be deemed to be a party to any such proceeding. . . .

B . . . In any proceeding under this Section the findings of the board of review as to the facts, if supported by sufficient evidence. . . . No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the board of review, and the board of review may, after hearing such additional evidence, modify its findings of fact or conclusions, and file with the court such additional or modified findings and conclusions, together with a transcript of the additional record. Such proceedings shall be heard in a summary manner and shall be given preference and priority over all other civil cases. . . .

LSA-R.S. 23:1635. Prompt payment of claims

A. If benefits are payable in any amount pursuant to a determination, redetermination, or a decision of an appeal referee, the board of review, or any court, such amount shall be promptly paid upon the issuance of such determination, redetermination or decision regardless of any appeal, or the pendency of the time for filing such appeal unless and until such determination, redetermination or decision, in which event benefits shall be paid or denied in accordance therewith for weeks of unemployment beginning subsequent to such redetermination or decision.

LSA-R.S. 23:1653. Duties and powers of administrator in general

The administrator shall administer this Chapter; and to that end he may adopt, amend, or rescind such rules and regulations, . . . and take such other action as he deems necessary.

LSA-R.S. 23:1691. Waiver of rights to benefits; agreements to pay employment contributions; discrimination against employees; penalty

No agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be valid. No agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contribution, required under this Chapter, from such employer, shall be valid. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him, require or accept any waiver of any right hereunder by any individual in his employ, discriminate in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his claiming benefits under this Chapter, or in any manner obstruct or impede the filing of claims for benefits. Any employer or officer or agency of an employer who violates any provision of this Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both.

LSA-R.S. 36:304. Powers and duties of secretary of labor

A. In addition to the functions, powers, and duties otherwise vested in the secretary by law, he shall: . . .

(6) Act as the sole agent of the state and administrator of the Louisiana Employment Security Law . . . For this purposes he may take such actions, in accordance with applicable state law, necessary to meet such federal standards as are established for the administration and use of such federal funds, except as otherwise specifically provided in this Title or by the constitution and laws of this state.

Opinions, Judgments, and Orders Below
(in pertinent part)

1. Decision of Appeals Tribunal, La. Dept. of Labor, (July 9, 1993)

   No employees have been discharged or permanently replaced by new hires. No allegations of any misconduct has been made by the employer. This section of law [LSA-R.S. 23:1601(2)] does not apply and cannot be used to disqualify the claimants for unemployment insurance benefits. (emphasis provided)

   While I personally believe that workers who have been permanently replaced by strike replacements should not be disqualified for unemployment insurance benefits, the Louisiana courts have consistently rejected this idea. *Associated Grocers, Inc. v. Administrator,* 496 So.2d 450, 452 [La. App. 1st Cir. [1986]) writ denied, 497 So.2d 1389 (La. 1986); *Standard Materials, Inc. v. Administrator Div. of Employment Security, Department of Labor,* 401 So.2d 400, 401 (La. App. 1st Cir. 1981).

2. Decisions of the Board of Review, La. Dept. of Labor (August 4, 1993)

   There is no testimony or evidence indicating that claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.,* 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

3. Decision of the La. Ct. of App., 5th Cir., (October 25, 1994), *Harry Abadie, Jr., et al. v. Bayou Steel Corporation, et al.*, 94-322 (La.App. 5 Cir. 10/25/94); 645 So.2d 779, writs denied, 94-2857 (La. 2/3/95); 649 So.2d 403; 94-2863 (La. 2/3/95); 649 So.2d 403.

   There is no testimony or evidence indicating that claimants have been "discharged" from their employment. Rather, the record indicates that former "strikers" have returned to work with this employer. In accordance with federal law, they continue to have the right to reinstatement upon application, as jobs become available. *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 Sup.Ct. 543, 19 L.Ed2d 614 (1967).

   The record also shows that there is no evidence that any of the claimants have been discharged by the plaintiff. In accordance with federal law, they continue to have the right of reinstatement upon application, *as jobs become available.* (emphasis added)

Quotes of Petitioner's State District Court Pleadings/ Memoranda

MEMORANDUM ON BEHALF OF THE SECRETARY OF LABOR TO THE DISTRICT COURT

* * *

As fiduciary of the Unemployment Compensation Fund, the Secretary of Labor, as Administrator of Employment Security, carries an obligation to investigate claims and to issue determination, as to qualification and eligibility, upon initial findings.

The original determination issued by the Administrator for these claimants was a disqualification for benefits under LSA-R.S. 23:1601(4). As this determination is and was an initial determination issued by the Administrator, based upon claim-taking information from the local offices as well as upon any protest information provided by the employer, this represents a simple outline of basic procedure for claims determination under LSA-R.S. 23:1624. This procedure also fulfills the promptness requirements for claim determination under 42 U.S.C. 503(1); *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971); and LSA-R.S. 23:1635.

The subsequent determination issued by the Administrator was based upon deliberation of subsequently gathered facts both through telephone conversation directly with the employer as well as on-site visit and meeting with the employer. LDOL Chief of UI Benefits . . . initiated at least three telephone calls to the Company and additional investigation was conducted by LDOL UI Technical Services Specialist. . . . The on-site visit

occurred within two weeks of such phone calls in further fact finding . . . on April 27, 1993. Not only was discussion held at that time at the site of Bayou Steel, but also, its representative, Mr. Vasques provided a copy of an agreement by replacement workers entitled, "Acknowledgment of Offer". The precise language of the acknowledgment, which required signature by the replacement worker, provided as follows:

BAYOU STEEL CORPORATION

Acknowledgment of Offer

> I acknowledge and understand that I have been made an offer of regular full-time employment. I understand that it is the Company's present intent that my employment will continue after the conclusion of the strike, but that this cannot be guaranteed. I further understand that I am not being employed for any specific term of employment.
>
> I understand that my being hired is contingent upon satisfactory results from a medical examination and drug test.
>
> /s Victor Manual Garcia
> Name
>
> 03-23-93
> Date

This is specific, written declaration of the intent of the employer that such employment will continue, although not guaranteed. This intent reflects regular at-will employment recognized in the State of Louisiana. It does not limit employment to a temporary term or any contingency other than satisfactory results from medical examination and drug testing.

* * *

III. PURPOSE AND INTENT OF EMPLOYMENT SECURITY LAW

The very purpose of unemployment compensation is provided in the declaration of public policy under LSA-R.S. 23:1471. It is therein declared that this remedy for unemployment shall be to "prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family."

* * *

15. It is *not* public policy under the word and spirit of the law that a company can exercise its right to hire replacement workers and oppose comparable relief of unemployment compensation to the claimants.

* * *

. . . The very meaning that must be accorded this purpose is that the law of unemployment compensation must prevent the longevity of unemployment. Such purpose must be equally extended and recognized, in full neutrality, by the Administrator in *all* claims determinations despite cause of unemployment, affiliation, or partisan pressure.

To allow the employer to gain the upper hand by replacement of workers without penalty of UI benefits promotes and encourages the very longevity of the unemployment of the claimants in complete derogation of public policy. Any incentive for the employer to negotiate in good faith for resolution of any dispute shall be completely lost. The findings of fact clearly reveal that the Company is and continues to carry a double-edge sword that cuts both ways against the claimants. This company

seeks to soften the blow of this dispute with the claimants by open-ended employment of replacement workers. The begging question that must be fully answered by court in all fairness to the claimants is: What remedy remains for them to lessen their economic hardship when a collective-bargaining agreement has expired and the Company has replaced them.

An objective interpretation of LSA-R.S. 23:1601(4) realizes that the Legislature contemplated that a disqualification therein would involve the simple scenario of diligent and good faith negotiation by both parties without the complicated factors of replacement of workers and lockout which negate such scenario. The myopic view of jurisprudence thrust upon the Appeals Tribunal and the Board of Review by the Company destroys the very purpose of this sacred intent of the Legislature.

IV. EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW

It is respectfully submitted to the Court that additional consideration should be even given as to any constitutional ramifications of denial of benefits to the claimants. It is significant to point out the scenario of the difference between the class of non-union claimants versus the class of union claimants. Illustrative of the difference in treatment of such two classes is as follows:

(1) Claimant A: Claimant A is a non-union worker under the right-to-work laws of the State of Louisiana. The employment contract of

Claimant A expires at midnight on March 20, 1993. While the former employer offers terms of new employment, such employer is hiring replacement workers under written agreement for indefinite, at-will employment. Claimant A is interested in negotiation to reach agreement in reemployment, but he is cognizant of the fact of such hiring of replacement workers. Claimant A files for unemployment compensation. Claimant A would be considered qualified for unemployment compensation under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. Claimant A thus would receive unemployment compensation.

(2) Claimant B: Claimant B is a union worker, employed under a collective-bargaining agreement with the employer. The collective bargaining agreement of Claimant B expires at midnight on March 20, 1993. While the Company offers terms of new employment, it is hiring replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of Claimant B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of such hiring of replacement workers. Claimant B files for unemployment compensation. Under case law interpretation of LSA-R.S. 23:1601(4), Claimant B must be denied unemployment compensation.

It is respectfully noted to the Court that the disparity in treatment in the above two (2) scenarios remains consistent even when Claimant A is a replacement worker.

Such constitutional discrimination and disparity against claimants was [sic] certainly not contemplated by the redactors of the provisions of LSA-R.S. 23:1601(4). *Pierre v. Administrator, Administrator, La. Office of Emp. S.*, 553 So.2d 442 (La. 1989). Such superficial interpretation by current case law of such statutory provision violates the very sanctity of the law. *National Gypsum*, supra. Such fabrication of classes of claimants by case law does not further any appropriate state interest, and thus violates equal protection provisions of both the State and Federal Constitutions. U.S.C.A. Const.Amends. 5, 14; LSA-Const. Art. 1, §§ 2, 3; *Pierre*, supra.

The case law further ignores LSA-R.S. 23:1691. Under the case law, there is a further creation of classes as illustrated below:

> (1) Claimant A: Claimant A is a non-union worker under the right-to-work laws of the State of Louisiana, commencing employment as of 1987. His single-employment contract expires at midnight on March 20, 1993. While the former employer offers terms of new employment, such employer is hiring replacement workers under written agreement for indefinite, at-will employment. Claimant A is interested in negotiation to reach agreement in reemployment, but he is cognizant to the fact of such hiring of replacement workers. Claimant A files for unemployment compensation. Claimant A would be considered qualified for unemployment compensation under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. Claimant A thus would receive unemployment compensation.

> (2) Claimant B: Claimant B is a union worker, employed under a collective-bargaining agreement with employer. The commencement of such collective bargaining agreement with employer is 1987. Such collective contract with Claimant B expires at midnight on March 20, 1993. While the Company offers terms of new employment, it is hiring replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of Claimant B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of such hiring of replacement workers. Under case law interpretation of LSA-R.S. 23:1601(4), Claimant B must be denied unemployment compensation. The adverse effect and impact upon Claimant B exercising his right to enter into a collective contract with the Company in 1987 is that he is penalized in his claim for unemployment compensation at the expiration of the terms of such contract when replacement workers for indefinite at-will employment are hired in his stead.

The consequence of for Claimant B is that LSA-R.S. 23:1691 is violated. Such provision in the law, states that "[n]o agreement by an individual to waive, release, or commute his rights under this Chapter shall be valid" and further carrier penalties in violation of such. It further imposes that "[a]ny employer or officer or agent of an employer who violates any provision of this Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both.["] In short, the penalties provided under

such provision reflect the seriousness of offense contemplated by the Legislature in addressing the protection of such right to unemployment compensation.

* * *

SUPPLEMENTAL OPPOSITION BY ADMINISTRATOR TO THE DISTRICT COURT

* * *

The tone of BSC's reply brief shall not be addressed in respect for this Court. The sole purpose of this forum is to consider all of the difficult factors in determination. The following points, however, are made:

1. The right of any company and exercise thereof to hire replacement workers is not questioned by the Administrator, nor is it the intent of the Administrator to penalize any exercise of federal rights. The Administrator cannot, however, completely ignore the significance and relevancy of replacement workers for the purpose of unemployment compensation.

2. Neutrality is the utmost concern but does not necessarily mean denial of benefits. It does mean the balancing of hardship in the furtherance of dispute resolution. It does mean full and ongoing investigation of claims.

3. Federal law for the sake of fair labor relations and collective bargaining does not govern qualification for unemployment compensation. State employment security law and the interpretation thereof mandate such qualification. Any definition of employee or employment under the federal law discussed by the Company is solely restricted to the "subchapter[s]" of labor relations of the U.S. Code and does not apply to unemployment compensation. 29 U.S.C. 151 et seq., LSA-R.S. 23:1472 et seq.

4. The right to unemployment compensation and qualification thereof is SEPARATE AND APART from the

right to hire replacement workers and any duty to continue employment. While the scale of rights is in balance, the scale of economic relief must not be out-of-kilter. Interpretation of unemployment compensation law must serve to maintain balance of economic relief.

5. The Administrator does not argue for a change in the law. Relevancy of replacement workers is jurisprudential rather than by statute. The civilian scheme of Louisiana law allows for reconsideration of precedent decisions. Jurisprudence is neither frozen in time nor etched in stone.

6. LSA-R.S. 23:1601(4) contemplates only the simple scenario of a strike and active progress of negotiation, with the intent to encourage swift resolution by equally placing the claimant and the Company at economic disadvantage. Previous case law has seriously failed to recognize this contemplation, thereby disregarding the element of replacement workers. This fundamental intent of such law is thus thwarted.

7. The Company is erroneous in declaring that it has only two (2) Hobson-like choices. There is no denial of any right to replace, but this does not necessarily preclude any right to unemployment compensation. The Company's rights in labor relations correspond in like kind to that of the claimants. Likewise, unemployment compensation law must preserve an even balance. Such Hobson-like questions are rather more poised for the claimant where benefits are denied upon replacement of workers. The Company is indeed an active party to the process as well, making and exercising voluntary choices,

such as rejection, acceptance, offer, and replacement, with their own incumbent consequences or results.

8. The Administrator is, furthermore, not intervening or seeking any intervention on behalf of any party. To seek a judicial determination as to qualification upon a complete review of the facts on the record is not a plea for intervention. Any contrary declaration defies the neutrality of the Administrator and the Court.

9. Any court decision in favor of qualification is never intended to "finance" any party, but rather to balance the financial condition of each party.

10. In its discussion of classes of claimants, the Company confuses the body of federal law on labor relations with that of the state law binding upon unemployment compensation. The Company seeks to dismiss the notion of any possibility of discharge for the purpose of unemployment compensation on the grounds of unrelated labor law. Such federal law recognizes certain rights and duties of each party in dispute but does not and cannot impose restrictions on the issues of employment and qualification for the administration of unemployment compensation.

11. The Administrator continues to contend that the Louisiana Right to Work Law has been infringed upon if and where there is a disparity of qualification between the replaced claimant who refrains from joining a union and the replaced claimant who does join a union. It is respectfully asked of the court whether the employer cannot have best of both worlds, exercising it right to indefinitely replace workers while demanding denial of any financial relief to the workers. The Right to Work is

not only a prohibition against a requirement of joining a labor union, but its own language recognizes the right to join a union without penalty or reprisal, in reiteration of federal law.

12. There has been *no* determination by the Administrator as to whether either party has bargained in good faith. The true query that must be respected is whether current case law promotes incentive for good faith relations and prompt resolution of any dispute.

* * *

15. It is *not* public policy under the word and spirit of the law that a company can exercise its right to hire replacement workers and oppose comparable relief of unemployment compensation to the claimants.

* * *

DEVOLUTIVE APPEAL ON BEHALF OF DEFENDANT, GAYLE F. TRULY, SECRETARY OF THE DPARTMENT [sic] OF LABOR AND ADMINISTRATOR OF LOUISIANA EMPLOYMENT SECURITY

For a proper perspective, it is distinctly noted to Court, in its review of the findings of fact, that any terms and definitions of the NLRA do not bind the U.S. Department of Labor (USDOL) or the LDOL as to any determination of separation and qualification for unemployment compensation benefits thereof. The definition of employment of unemployment compensation purposes is strictly defined under LSA-R.S. 23:1472(19)(a), as follows:

> any individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount.

---

* * *

1.

The LDOL is aggrieved by the below judgment rendered by the Court of Appeal, Fifth Circuit, and left with the judgment that shall make it impossible for the department to fulfill its duty to administer the unemployment compensation (UC) law. The manifestly erroneous interpretation of statutory and constitutional law will unjustly impact the public interest and leave significant issues of law unresolved. The decision of the Court has excluded any recognition and analysis of the statutory elements of provisions of law under the Louisiana Employment Security Law (LESL). LDOL will be left with not knowing which factual aspects of any unemployment claim or which statutory components of the UC law to ignore and/or to apply.

2.

The lower courts have further committed gross and manifest error by applying the wrong body of governing law to the facts in this case, applying the premises of the Federal National Labor Relations Act (NLRA) in total disregard of the state UC law.

3.

As a result, the following statutory and constitutional provisions are at risk of future misinterpretation, misapplication, or non-application:

> U.S. Const.Amends. 5 and 14; LSA-Const. Arts. 1, §§ 2, 3 and Art. 5, §10; 26 U.S.C. section 3301

et seq. (Federal Unemployment Tax Act); 29 U.S.C. section 141 et seq. (Labor Management Relations Act); 29 U.S.C. section 151 et seq. (National Labor Relations Act); 42 U.S.C. section 501 et seq. (Social Security Act); LSA-R.S. 23:981 (Louisiana Right to Work Law); LSA-R.S. 23:1471, et seq. (Louisiana Employment Security Law); LSA-R.S. 23:1472(12) and 1472(19)(a); LSA-R.S. 23:1600; LSA-R.S. 23:1601(1) through 1601(4); LSA-R.S. 23:1624; LSA-R.S. 23:1627 through 1631; LSA-R.S. 23:1634 and 1635; LSA-R.S. 23:1651 and 1652; LSA-R.S. 23:1691; LSA-R.S. 36:304; LSA-C.C. Art. 2745 et seq.

4.

If the decisions of the lower courts are left to stand, the only question that LDOL will be unlawfully restricted to ask in the future is whether (1) the claimant is a member of a union and (2) whether there is a work stoppage. LDOL cannot delve further to determine any other facts and applicable statutory or constitutional elements. Disqualification of such kind of claimant will be automatic. The federal and state constitutions, The LESL, Federal Unemployment Tax Act (FUTA), and the Louisiana Right to Work Law (RTW) will have no bearing upon an unemployment compensation claim and provide no protection to a particular class of workers.

* * *

8.

UC law derives not from the National Labor Relations Act (NLRA), but from the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA). Such

result will jeopardize compliance with FUTA's definition of unemployment . . .

9.

If FUTA is to be applied under NLRA dictates and the lengthy wait for National Labor Relations Board (NLRB) decisions, the very purpose of prompt payment required under *California Department of Human Resources Development v. Java*, 402 U.S. 121, 91 S.Ct. 1347 (1971) is denied.

10.

In particular, if this Court adopts the reasoning of the Court of Appeal, LDOL is left with judicial interpretation that:

> a. an expiration of contract of employment is irrelevant for determination of UC claim as to cause of unemployment for union workers (but not irrelevant for non-union workers). LSA-R.S. 23:1601(2).
>
> b. the definitions of "employment" and "unemployment" are to be ignored when a union worker files an UC claim. LSA-R.S. 23:1472(12), (19).
>
> c. NLRA criteria are imposed upon the UC program.
>
> d. the statutory factors of disqualification under LSA-R.S. 23:1601(4) must be ignored. Pursuant to the Court's interpretation, if any work stoppage exists, and the claimant is a union

worker, then a disqualification is assessed without consideration of the specific components within the statute.

e. the application of LSA-R.S. 23:1601(4) is rendered unconstitutional, resulting in disparate treatment of union workers compared to non-union workers in violation of equal protection rights. Upon expiration of contract, a non-union worker is terminated and is otherwise eligible for UC benefits under LSA-R.S. 23:1601(2).

The lower courts' decisions and prior case decisions are, therefore, (1) in violation and derogation of applicable law and the state and federal constitution; and (2) leaves significant issues of law unresolved, which must be reversed by court.

* * *

SPECIFICATIONS OF ALLEGATIONS OF ERROR

SPECIFICATION OF ERROR NO. 1: LOWER COURT OF APPEAL ERRONEOUSLY APPLIES WRONG BODY OF LAW TO DEFINITIONS OF "UNEMPLOYMENT" AND "EMPLOYMENT" FOR UC PURPOSES.

SPECIFICATION OF ERROR NO. 2: LOWER COURT OF APPEAL FAILS TO RECOGNIZE EXPIRATION OF CONTRACT OF HIRE FOR PURPOSES OF QUALIFICATION FOR UC.

* * *

SPECIFICATION OF ERROR NO. 6: CONSTRUCTION OF LSA-R.S. 23:1601(4) BY COURT OF APPEAL VIOLATES CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW.

* * *

SUMMARY OF ARGUMENT

* * *

There is further failure to distinguish the NLRA from the LESL. Thus, the Court confused the concept of unemployment for unemployment compensation purposes, erroneously applying the NLRA concepts of continued employment and rights of reinstatement.

* * *

ARGUMENT

SPECIFICATION OF ERROR NO. 1: LOWER COURT OF APPEAL ERRONEOUSLY APPLIES THE WRONG BODY OF LAW TO DEFINITION OF "UNEMPLOYMENT" AND "EMPLOYMENT" FOR UC PURPOSES.

The NLRA does not bind the U.S. Department of Labor (USDOL) or the LDOL as to any determination of employment separation or qualification for UC benefits. "Unemployment" for UC purposes is strictly defined under LSA-R.S. 23:1472(19)(a),

> any individual shall be . . . "unemployed" any week during which he performs no services and with respect to which *no wages* are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount (emphasis added)

Under LSA-R.S. 23:1472(12),

> "Employment" means . . . any services including service in interstate commerce, performed *for wages* or under any contract of hire, written or oral, express or implied (emphasis added)

Under the NLRA, claimants who are obviously unemployed for UC purposes, by contrast, continue to be employed and have other certain protected rights, even where no services are performed or their contract of hire expires. Reinstatement is not treated as a "new" hire under the NLRA, while reinstatement is defined as a new hire/job under FUTA at 26 U.S.C. section 3304(a). For UC purposes, it is *absolutely impossible* for an individual to be employed and unemployed at the same time; however, the decisions of both the lower courts and the Board of

Review (BOR) have mistakenly confused administration and interpretation of the UC law with NLRA.

The BOR and the lower courts here have inconsistently applied various laws to fulfill their decisions. On one hand, the lower bodies have utilized the NLRA definition of "continued employment", dismissing applicability of LSA-R.S. 23:1472(19), LSA-R.S. 23:1601(1), LSA-R.S. 23:1601(2), and C.C. Art. 2745 *et seq.* to thereby justify their decisions that the claimants are *not* unemployed. On the other hand, the lower bodies have weakly attempted to apply the state law under LSA-R.S. 23:1601(4) to find *status of unemployment* that is disqualifying. Thus, the court erroneously denied the applicability of LSA-R.S. 23:1601(1) and LSA-R.S. 23:1601(2) under reasoning that the claimants were *employed* (emphasis added), at the same time applying LSA-R.S. 23:1601(4) for the proposition that claimants were *unemployed* due to a labor dispute. Neither the BOR nor the courts can have it *both ways* in the proper administration of the law. "Shuttling" of claims to such absurd results is unacceptable.

* * *

For purposes of UC, claimants are *unemployed immediately* upon their separation from employment as a result of the expiration of their contract of hire. There is no longer an employer-employee relationship upon expiration of contract. In claims determination, LDOL's only concern is whether services are being performed for wages and whether a contract of hire exists in the claim period. If not, under LSA-R.S. 23:1472(19), the claimants are unemployed as to the application of *all* the applicable

provisions of qualification under LSA-R.S. 23:1601(1), (2), and (4).

The lower court failed to distinguish and separate the NLRA and UC law. Although the claimants no longer had a job, the Court of Appeal unjustifiably refused to acknowledge the basic premise of the unemployment insurance program and in its lack of understanding, refused to apply LSA-R.S. 23:1601(2). Instead, the Court substituted the NLRA concepts of "continued employment" and "right of reinstatement".

SPECIFICATION OF ERROR NO. 2: THE DECISION OF THE LOWER COURT OF APPEAL FAILS TO RECOGNIZE EXPIRATION OF THE CONTRACT OF HIRE FOR PURPOSES OF QUALIFICATION FOR UC.

* * *

In this case, the term of the employment contract expired on 03/20/93. For LESL, the employer-employee relationship ended immediately upon expiration of the contract.

* * *

It is noted that any performance for wages after 03/20/93 would be under a *new* contract of hire or at-will employment. "New work" under FUTA at 26 U.S.C. section 3304(a), has been interpreted to include the offer of reemployment to an unemployed individual by the last employer or some other previous employer and is considered a *new* contract of employment. The record shows that the Company had conceded that the contract expired. Thus, such claim analysis contrasts the NLRA concepts of continued employment.

* * *

One can hardly be unemployed *through his own fault* where (1) he has an expired contract of hire and (2) suitable work is unavailable. The NLRA simply addresses fair labor negotiating standards to be followed by employers and unions in negotiations. NLRA has absolutely nothing to do with UC. No rights under UC law can be waived, released, or commuted under 42 U.S.C. section 3303(a)(1) and LSA-R.S. 23:1691.

* * *

The course of claim examination and the statutory elements of law were fully ignored, causing a material injustice to the public and leaving the Administrator with an impossible means of administering this law.

* * *

The Administrator does *not* argue for a change in the law.

* * *

SPECIFICATION OF ERROR NO. 5: JURISPRUDENTIAL INTERPRETATION OF LSA-R.S. 23:1601(4) VIOLATES FEDERAL AND STATE STATUTORY RESTRICTIONS OF 42 U.S.C. SECTION 3303(A)(1) AND LSA-R.S. 23:1691 FOR PRESERVATION OF RIGHTS AND BENEFITS.

Under LSA-R.S. 23:1691, "[n]o agreement by an individual to waive, release, or commute his rights under this Chapter shall be valid" and further carries penalties for any violation of such protection of unemployment rights. It further imposes that "[a]ny employer or officer or agent of an employer who violates any provision of this

Section shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one month nor more than six months, or both." In short, the penalties provided under LSA-R.S. 23:1691 reflect the seriousness of offense contemplated by the Legislature in addressing the protection of such right to UC under 42 U.S.C. section 3303(a)(1) and Louisiana law.

Under the case law there is a further creation of classes as illustrated below:

1. CLAIMANT A is a non-union worker under the right-to-work laws of the State of Louisiana, commences employment in 1987. His single-employment contract has original expiration date of 02/28/93, with two (2) subsequent extensions, ultimately expiring at midnight 03/20/93. On 03/21/93, CLAIMANT A is unemployed under LSA-R.S. 23:1472(19)(a). While the former employer offers terms of new contract of hire, employer hires replacement worker under written agreement for indefinite, at-will employment. CLAIMANT A is interested in negotiation to reach agreement in reemployment, but he is cognizant of the fact of such hiring of replacement workers. CLAIMANT A files for UC. CLAIMANT A is qualified for UC under discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. CLAIMANT A receives UC.

2. CLAIMANT B is a union worker, employed under collective-bargaining agreement with employer. Terms of collective-bargaining agreement commence in 1987. Collective-bargaining

> agreement has original expiration date of 02/28/93, with two (2) extensions, ultimately expiring at midnight on 03/20/93. On 03/21/93, CLAIMANT B is unemployed under LSA-R.S. 23:1472(19)(a). While Company offers terms of new contract of hire, it hires replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of CLAIMANT B, is interested in further negotiation of terms of reemployment of membership, but its membership is cognizant of Company's hiring of replacement workers. Claimant B files for UC. Under case law interpretation of LSA-R.S. 23:1601(4), CLAIMANT B is automatically denied UC.

The adverse effect and impact upon CLAIMANT B exercising his right to enter into a collective contract with the Company in 1987 is that he is penalized in his claim for UC at the expiration of the terms of such contract in 1993 despite the employment of replacement workers for indefinite at-will employment in his stead.

Such consequence for CLAIMANT B is that federal law and LSA-R.S. 23:1691 is violated and the collective contract serves not only as an employment contract, but also as a contract of automatic waiver of UC benefits in direct violation of the intent of federal law and LSA-R.S. 23:1691.

By contrast, the rationale of the attached Charts 1 and 2 does not impose automatic denial of benefits merely due to a cursory conclusion of a labor dispute under LSA-R.S. 23:1601(4). Denial of benefits under these charts is triggered by actions and behavior of the parties within any dispute. This rationale is not based on any distinction

of collective work agreement, upon which existing case law relies. There is no automatic waiver of benefits under such rationale of the attached charts and, therefore, no violation of 42 U.S.C. section 3303(a)(1) and LSA-R.S. 23:1691.

* * *

SPECIFICATION OF ERROR NO. 6. CONSTRUCTION OF LSA-R.S. 23:1601(4) BY COURT OF APPEAL VIOLATES CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION ACCORDED UNDER FEDERAL CONSTITUTIONAL LAW; STATE CONSTITUTIONAL LAW; AND LOUISIANA EMPLOYMENT SECURITY LAW.

Serious consideration should be given to any constitutional ramifications of denial of benefits to the claimants who fulfill terms of agreement under existing Louisiana law. It is significant to point out the scenario of the difference between the class of non-union claimants versus the class of union claimants. Illustrative of the difference in treatment of such two (2) classes under such case law is as follows:

> (1) CLAIMANT A is a *non-union* worker under the right-to-work laws of the State of Louisiana. The single-employment contract of CLAIMANT A has original expiration date of 02/28/93, with two (2) extensions, expiring at midnight on 03/20/93. On 03/21/93, CLAIMANT A is unemployed under LSA-R.S. 23:1472(19)(a). While the former employer offers terms of new employment to former employee, employer hires a replacement worker under written agreement for indefinite, at-will employment.

> CLAIMANT A is interested in negotiation to reach agreement of reemployment but is cognizant of the fact of such hiring of a replacement worker. CLAIMANT A files for UC. CLAIMANT A would be considered qualified for UC under the discharge provisions of LSA-R.S. 23:1601(2) for having lost his job without disqualifying misconduct. CLAIMANT A, thus, receives UC.
>
> (2) CLAIMANT B is a *union* worker, employed under a collective-bargaining agreement with the employer. The collective-bargaining agreement of CLAIMANT B has original expiration date of 02/28/93, with two (2) extensions, expiring at midnight on 03/20/93. On 02/2193, CLAIMANT B is unemployed under LSA-R.S. 23:1472(19)(a). While employer offers terms of new employment, it hires replacement workers under written agreement for indefinite, at-will employment. The union, as agent on behalf of CLAIMANT B, is interested in further negotiation of terms of reemployment of its membership, but its membership is cognizant of the fact of hiring of replacement workers. CLAIMANT B files for UC. Under the simplistic case law interpretation of LSA-R.S. 23:1601(4), CLAIMANT B is automatically denied UC.

The disparity in treatment in the above two (2) scenarios remains consistent even when CLAIMANT A is a replacement worker under an expired contract.

* * *

Superficial interpretation by current case law of such statutory provision violates the very sanctity of the law. *National Gypsum*, 313 So.2d 230. Such fabrication of classes of claimants by case law does not further any appropriate or compelling state interest, and thus violates

equal protection provisions of both the State and Federal Constitutions. U.S. Const. Amends. 5, 14; Const. Art. 1, §§ 2, 3;. . . .

By contrast, Charts 1 and 2 reveal proper interpretation of LSA-R.S. 23:1601(4) whereby all claimants, union or non-union, are equally treated and protected under the same type of separation. It is also added that such Charts 1 and 2 clarify elements that must be met by parties in application of LSA-R.S. 23:1601(4). See also outline of elements of LSA-R.S. 23:1601(4) above.

It is pointed out that the Company has sought before the lower court to erroneously dismiss the notion of any possibility of discharge for the purpose of UC on the grounds of the *unrelated* NLRA. In its discussion of classes of claimants, the Company confuses federal law on labor relations with federal and state laws binding upon UC. As discussed in this brief, such federal law recognizes certain rights and duties of each party in dispute and can even aid in determining the behavior of the parties, but such federal law does not and cannot impose restrictions on the issues of employment and qualification for the administration of UC.

* * *

The serious consequence of Louisiana jurisprudence . . . is that it grants one party the unfair advantage and the prerogative to manipulate the very terms and progress of negotiations, thus, allowing the employer the freedom to prolong negotiation, without any harm for as long and arduous as it desires.

* * *

Administrative Record

[p. 10] ADAMS: Does the company have a collective bargaining agreement with local 9121?

FLANAGAN: It currently does not.

ADAMS: They – I assume then that the agreement is expired?

FLANAGAN: Yes, it has.

* * *

[p. 33] ROBEIN: Can you read the statement attributed to him?

FLANAGAN: We have every intent to keep them as long term employees.

ROBEIN: Keep who? There's a previous sentence.

FLANAGAN: Oh, as for the replacement workers, it says, "We every intent to keep them as long term employees."

ROBEIN: Isn't there a sentence before that? Let me read it to you. "When the strike ends, Bayou Steel expects to reinstate the workers on strike only if jobs are available."

* * *

[p. 36] ROBEIN: (cont.) plant before the strike started?

FLANAGAN: We took applications for the positions that were listed in the ad, yes.

ROBEIN: That's every position in the plant.

FLANAGAN: May very well be. I don't know. I don't remember all the positions we listed here, but it was our intent to interview for positions in the plant.

ROBEIN: For every position in the plant subject to the strike, correct?

FLANAGAN: If we had the potential of every position being vacant, yes.

ROBEIN: And you've got an application for every position in the plant, do you not?

FLANAGAN: I cannot say that's true, no.

ROBEIN: You don't know?

FLANAGAN: I just don't know at this point and time.

ROBEIN: The strike didn't start until March 21, why were you taking up to 500 applications for just about every position in the plant?

FLANAGAN: I believe on February 26, the union informed us that they had taken a strike vote, that they'd sought a strike vote from their members and had received approval to call a strike at any time upon the expiration of the contract which was supposed to expire on February 28.

ROBEIN: But it didn't.

FLANAGAN: There was an extension made, I think, until – the first extension was till March 10.

ROBEIN: Several extensions, right? There's more than one extension.

FLANAGAN: I believe there is (sic) two extensions.

* * *

[p. 39] ROBEIN: (cont.) workers on strike only if jobs are available."

ADAMS: That's not a quote –

ROBEIN: It's in the file.

ADAMS: – is it?

ROBEIN: It's, it's attributed to Mr. Gonzales.

FLANAGAN: I don't, I don't see that as characterizing as being attributed to Mr. Gonzales. This is a statement by the reporter from what I can see.

ROBEIN: Is it an untrue statement? Is it an untrue statement?

FLANAGAN: Is it an untrue statement?

ROBEIN: You've indicated that you know any and everything about ali plans regarding replacement workers. Is that an untrue statement, that sentence that I just read from that article.

FLANAGAN: No, it's not an untrue statement if the job, if their job is available, they'll be returned to it at the end of the strike.

ROBEIN: How many jobs right now are not available for filling, for filling by striking employees, how many jobs?

FLANAGAN: Can you repeat your question again, sir, so I understand it.

ROBEIN: How many jobs today are not available to Mr. Ferraro, Mr. Porter and the other individuals that are subject to this disqualification (inaudible), how many –

FLANAGAN: Zero.

ROBEIN: Zero?

FLANAGAN: Zero.

ROBEIN: How do you explain the previous statement that after the strike there may not be jobs available for them?

[p. 40] ROBEIN: There may not be jobs available.

FLANAGAN: There may not be jobs available.

ROBEIN: You don't know that what jobs are available and what jobs aren't, do you?

* * *

[p. 42] ROBEIN: I'm asking you now. I'm not asking you about his questions. I'm asking you, how many employees are subject to possible discharge upon the conclusion of this strike?

FLANAGAN: I don't know.

ROBEIN: More than one?

FLANAGAN: Possibly.

ROBEIN: Could it be more than 10?

FLANAGAN: I don't know that.

ROBEIN: You know, and I know that, y'all have reams of video of picket line activity and you probably know that during the course of negotiations, Mr. Gonzales and Mr. Hank Vasquez of your company have indicated that a nonspecified number of striking employees will be subject to discharge upon the conclusion of the strike and the decision will be made upon the conclusion of the strike concerning those person's eligibility for rehiring, you know that, don't you?

FLANAGAN: I do not agree with your characterization of the question. I know there have been statements that we feel there may be employees that have potentially had serious misconduct during the strike.

ROBEIN: And who could potentially be fired?

FLANAGAN: I don't believe we've made that determination.

ROBEIN: You're not –

FLANAGAN: In fact, we've not made those determinations yet.

ROBEIN: Are you in the loop, so to speak, with respect to that decision making, will you be part of that decision making?

* * *

[p. 87] ROBEIN: So if tomorrow the claimants come back to work will they be working under the old contract? If the claimants were to come back to work today, at 1:00 this afternoon, would they be working under the old contract or the May 18th proposal?

FLANAGAN: Every worker that seeks to return to his job comes back under the pay and benefits contained under the old contract.

ROBEIN: For how long?

ADAMS: I have to object to that question. It calls for pure speculation.

JUDGE: Okay.

ADAMS: It depends on so many variables that there's no possible way that this witness can answer this question.

JUDGE: All right. It's interesting so I'll overrule and see if he can answer the question.

ROBEIN: For how long – would they work under the old contract?

FLANAGAN: Until such time that a new contract is negotiated between the parties. Or that the parties would reach impasse, an impasse would be declared, and there may be implementation of certain items of the proposal by the company. And –

* * *

[p. 93] ROBEIN: – 16. Are these the – the employees identified by job title, are these persons hired after March 21 or do they include employees that originally struck on March 21 and returned to work?

FLANAGAN: These include only new hires after March 21, 1993.

ROBEIN: Literally strike replacements?

FLANAGAN: That's correct.

ROBEIN: Do we have a total?

FLANAGAN: There's been a total of 122 hired, I think, as I testified on Monday.

ROBEIN: And they're all reflected in here?

FLANAGAN: Yes.

* * *

[p. 94] ROBEIN: Number seven states, "The decision as to whether striking employees will be allowed to return and displace replacement workers will be decided when the request to return to work is made." Do you know who the author of number seven is?

FLANAGAN: Can I read it again, Mr. Robein?

ROBEIN: Sure. I'm referring to item seven on Claimant's Exhibit 18.

FLANAGAN: Thank you. As far as the specific person that authored it, I'm not quite sure, but I know it was prepared under the direction of legal counsel.

ROBEIN: Fred Sullivan, Mr. Sullivan your labor counselor?

FLANAGAN: I believe it was prepared under the direction of Fred Sullivan and also Bob Devit (phon.).

* * *

[p. 95] ROBEIN: If 250 strikers returned right now, would there be jobs for them?

FLANAGAN: Each one of the returning strikers' ability to return would be based on a review, as I said earlier, of their individual request for reinstatement.

ROBEIN: What if – what if everyone reported en masse, 250 plus?

FLANAGAN: We would review each individual for – as I say earlier, potential serious misconduct in regard to the strike.

* * *

QUOTES OF PERTINENT CASES

FEDERAL CASES:

402 U.S. 121, 28 L.Ed.2d 666
CALIFORNIA DEPARTMENT OF
HUMAN RESOURCES DEVELOPMENT et al.,

v.

JAVA et al., 402 U.S. 121 (1971)

Page 91 S.Ct. 1355 follows

We conclude that the word 'due' in s 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that the California procedure, which suspends payments for a median period of seven weeks pending appeal, after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'

440 U.S. 519

NEW YORK TELEPHONE COMPANY et al., Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR et al.,
440 U.S. 519 (1979)

* * *

The omission of any direction concerning unemployment compensation payments to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress, which was undeniably aware of the possible impact of unemployment compensation on the bargaining process, intended that the states be free to authorize or even prohibit such payments, . . .

* * *

(a) This case does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field but rather involves a state program for the distribution of benefits to certain [440 U.S. 520] members of the public.

* * *

In any event, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress.

* * *

Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations

Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments. (FN43)

* * *

On several occasions since the 1930's Congress has expressly addressed the question of paying benefits to strikers, and especially the effect of such payments on federal labor policy. (FN44) On none of these occasions has it suggested that such [440 U.S. 545] payments were already prohibited by an implicit federal rule of law. Nor, on any of these occasions has it been willing to supply the prohibition. The fact that the problem has been discussed so often supports the inference that Congress was well aware of the issue when the Wagner Act was passed in 1935, and that it chose, as it has done since, to leave this aspect of unemployment compensation eligibility to the States.

STATE CASES:

ELMER CANDY CORPORATION

v.

ADMINISTRATOR OF EMPLOYMENT SECURITY, 286 So.2d 423 (La.App. 1st Cir. 1973), rehearing denied.

* * *

It is readily apparent that under the well established provisions of the Federal Labor Law that the claimants were entitled to reinstatement if jobs become available. However, there is no evidence that any of the claimants made any effort to be reinstated if jobs became available. Their right to be reinstated could only be defeated if the

employer could show 'legitimate and substantial business justifications.' *National Labor Relations Board v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792

NATIONAL GYPSUM COMPANY

v.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, 313 So.2d 230 (La. 1975)

* * *

In enacting the unemployment compensation statute, the legislature solemnly declared that, 'as a guide to the interpretation and application' of its statutory provisions, 'the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life.' Thus unemployment compensation is not paid primarily to reward the employee nor to punish the employer, but rather to protect the stability of the state and of the family, by relieving the family distress and the menace to the public welfare occasioned through unemployment of individual workers.

* * *

However, the legislature also provided for the disqualification from such benefits for employees who left

employment or refused to accept it without good cause or who had been discharged for misconduct. La.R.S. 23:1601(1), (2) (see footnote 1 above). It additionally provided that employees could not receive benefits for unemployment 'due to a labor dispute which is in active progress' on the premises.

* * *

In view of the strong public policy of the act designed to avoid crushing hardship on unemployed workers and their families, we think the more reasonable interpretation of the disqualification to be that unemployment due to 'a labor dispute in active progress' includes only unemployment resulting from labor disputes in which the employee himself actively engages by refusing to work.

PIGGLY WIGGLY OF SPRINGHILL, INC.

v.

GERACE, 370 So.2d 1327 (La.App. 2d Cir. 1979)

* * *

The National Labor Relations Act, 29 U.S.C.A. 152(3), is clear in its provision that an employee whose work has ceases as a consequence of a labor dispute continues to be an employee if he has not obtained a regular and substantially equivalent employment. *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 S.Ct. 543.

* * *

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NO. 94-1821

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,
Petitioner,

versus

BAYOU STEEL CORPORATION,
Respondent,

and

HARRY ABADIE, JR., et al.,
Respondents.

On Petition for Writ of Certiorari
To The Louisiana Supreme Court

BRIEF FOR RESPONDENT, BAYOU STEEL CORPORATION, IN OPPOSITION

Howard E. Sinor, Jr.
Counsel of Record
H. Mark Adams
Katy Kimbell Theriot
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 50th Floor
New Orleans, LA 70170-5100
Phone: (504) 582-8000
Fax: (504) 582-8011
Attorneys for Respondent,
Bayou Steel Corporation

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

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QUESTIONS PRESENTED

This action presents no federal statutory or constitutional question. The only question presented is one purely of state law: whether, in the decisions below, the administrative tribunals and the Louisiana courts properly denied unemployment compensation to striking former employees of Respondent, Bayou Steel Corporation, under a Louisiana statute that disqualifies individuals from receiving benefits when their "unemployment is due to a labor dispute which is in active progress" at their place of employment. La. Rev. Stat. Ann.§ 23:1601(4) (West 1985).

PARTIES

Petitioner, Gayle F. Truly, is the Secretary of the Louisiana Department of Labor and Administrator of the Louisiana Office of Employment Security.

Respondent, Bayou Steel Corporation, is a Delaware corporation, qualified and doing business in the State of Louisiana. There are no parent companies or subsidiaries (except wholly owned subsidiaries) of Bayou Steel Corporation that are required to be listed under Supreme Court Rule 29.1.

Respondents, Harry Abadie, Jr., et al., are striking employees of Bayou Steel Corporation, who are claimants for unemployment compensation under the Louisiana unemployment compensation law. Their interests in the proceedings below were aligned with the Petitioner.

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No. 94-1821

In The

Supreme Court of the United States

October Term, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,
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versus

BAYOU STEEL CORPORATION,
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and

HARRY ABADIE, JR., et al.,
Respondents.

On Petition for Writ of Certiorari
To The Louisiana Supreme Court

BRIEF FOR RESPONDENT, BAYOU STEEL CORPORATION, IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

For the reasons stated below, Respondent, Bayou Steel Corporation ("Bayou Steel" or the "Company"), respectfully requests that this Court deny the petition for writ of certiorari filed by Petitioner, Gayle F. Truly, Secretary of the Louisiana Department of Labor and Administrator of the Louisiana Office of Employment Security ("Petitioner" or "Administrator").

OPINIONS BELOW

On March 21, 1993, after commencing a strike against their employer, Bayou Steel, Respondents, Harry Abadie, Jr., et al (the "Strikers" or "claimants"), filed claims for unemployment benefits with the Louisiana Office of Employment Security. The Strikers' claims initially were denied, but, on May 4, 1993, the Administrator arbitrarily reversed the initial determination and awarded benefits. Bayou Steel appealed, and a hearing was conducted before an administrative law judge ("ALJ") of the Louisiana Department of Labor. On July 9, 1993, the ALJ reversed the Administrator's award of benefits and disqualified the Strikers from receiving unemployment compensation. The Strikers then appealed to the Louisiana Board of Review, which, on August 4, 1993, affirmed the ALJ's decision. The Strikers next filed a petition for judicial review with the 40th Judicial District Court for the Parish of St. John the Baptist, naming both Bayou Steel and the Administrator as defendants.[1] On December 28, 1994, the district court affirmed the decision of the Board of Review, and the Strikers and the Administrator appealed to the Louisiana Fifth Circuit Court of Appeal. On October 25, 1994, the court of appeal affirmed the judgment of the district court, Abadie v. Bayou Steel Corp., 645 So. 2d 779 (La. Ct. App. 1994), and the Strikers and the Administrator filed petitions for writs of review to the Louisiana Supreme Court. On February 2, 1995, the Louisiana Supreme Court denied the petitions, finding the decisions below not worthy of further review. Abadie v. Bayou Steel Corp., 649 So. 2d 403 (La. 1995).

---

[1]Although the Louisiana statutory procedure governing judicial review of unemployment compensation decisions required the Strikers to name the Administrator as a co-defendant with Bayou Steel, the position of the Administrator in this matter clearly was aligned with that of the Strikers.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257 (West 1993). This Court, however, lacks jurisdiction over this action because it presents no genuine issue under any federal statute and raises no significant claim under the United States Constitution or 42 U.S.C.A. § 1983 (West 1994). Indeed, this Court, in similar contexts, has rejected all of Petitioner's contentions. See, e.g., Baker v. General Motors Corp., 478 U.S. 621 (1986); New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No federal constitutional provisions or statutes are involved in this case. This matter exclusively involves a Louisiana statute, La. Rev. Stat. Ann § 23:1601(4) (West 1985), which states, in pertinent part:

> An individual shall be disqualified for [unemployment compensation] benefits:
>
> (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

STATEMENT OF THE CASE

I. Clarification of Misrepresentations in Petitioner's Statement of the Case

Conspicuously absent from Petitioner's statement of the case is any reference to the most critical fact: the claimants for whom Petitioner seeks authority to award unemployment benefits are unemployed because *they are on strike*. They are unemployed because they have chosen to picket rather than to work. Therefore, because the claimants' unemployment is due to a labor dispute that is in active progress and in which they are participating, they are disqualified, under the Louisiana statute, from receiving unemployment compensation. While these facts are central to the Louisiana administrative and judicial decisions from which Petitioner seeks to appeal, one would never know, from reading the Administrator's petition and brief, that the claimants are on strike. Rather, Petitioner states that the claimants were disqualified, in the decisions below, solely because they are union members whose "contract of hire" (the collective bargaining agreement) has expired. Rather than acknowledge the claimants' voluntary strike as the reason for their unemployment, Petitioner states, as if it were a matter of fact, that the Strikers are unemployed solely because their collective bargaining agreement (which Petitioner calls a "contract of hire") has expired. Petitioner's statement of the case is a blatant misrepresentation of the facts of this case and of the holdings of the decisions below.

II. Respondent's Statement of the Case

The following facts are established by the record and form the basis of the decisions below. On March 21, 1993, more than three-hundred employees represented by Local 9121 of the United Steel Workers of America (the "Union") voluntarily commenced an economic strike against their employer, Bayou

Steel. For several months prior to the strike, Bayou Steel and the Union had been engaged in negotiations for a new collective bargaining agreement. When the old agreement expired in February 1992, it was extended by mutual agreement through March 21, 1993. On March 19, 1993, the Union notified the Company that the Union would not agree to another extension of the agreement and that the employees would commence a strike when the then current extension expired two days later. Before they commenced their strike, the Strikers were instructed by the Union to file claims for unemployment compensation with the Louisiana Office of Employment Security. The first claims were filed on March 21, 1993, the day the strike began.

No negotiating impasse was ever declared. Thus, when the final contract extension expired and the strike began, the Company continued to employ all bargaining-unit employees who chose not to join the strike under the same terms and conditions, at the same rates of pay, with the same benefits provided under the expired agreement. In addition, every striking employee who elected to cross the picket line and return to work was reinstated under the terms of the expired agreement, and all replacement workers hired after the strike began were hired under the terms of the expired agreement.

In summary, although the Strikers could have continued their employment with Bayou Steel under the terms of the expired agreement, they chose to go on strike. Although work was available, they chose to be unemployed. Under these circumstances, Louisiana law disqualifies the Strikers from receiving unemployment benefits.

REASONS FOR DENYING THE WRIT

I. None of Petitioner's Arguments Warrant Review by this Court.

As indicated above and as is evident throughout the Administrator's petition and brief, the cornerstone of all of Petitioner's arguments is the false notion that the expiration of the collective bargaining agreement between Bayou Steel and the Union caused the Strikers' unemployment. This notion defies the facts as found in the decisions below:

> In this case, the claimants refused to accept an extension of the expiring contract. An extension would have allowed them to continue working as they had for the prior six year period, while negotiations for a new contract continued. Rather, the claimants elected to strike.

Abadie v. Bayou Steel Corp., 645 So. 2d 779, 782 (La. Ct. App. 1994), writ denied, 649 So. 2d 403 (La. 1995). Because the expiration of the collective bargaining agreement did not cause the Strikers' unemployment, all of Petitioner's arguments fail. For this reason alone, the Administrator's petition for writ of certiorari should be denied.

II. Louisiana's Unemployment Compensation Scheme is Neither Preempted By Nor In Conflict With Federal Law.

Petitioner first argues that the Federal Unemployment Tax Act and the Social Security Act preempt state unemployment compensation law and, in particular, the eligibility criteria established by the Louisiana legislature in La. Rev. Stat. Ann. § 23:1601(4) (West 1985). This Court squarely and unequivocally

rejected this argument nearly 20 years ago in Ohio Bureau of Employment Services. v. Hodory, 431 U.S. 471 (1977). There this Court stated: "The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area." Id. at 488-89. Since then, this Court repeatedly has held that "the several States . . . have broad freedom in setting up the types of unemployment compensation that they wish," and that the states are free to "fashion[] their own unemployment compensation programs and especially their own eligibility criteria." New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 537, 539 (1979). See also Baker v. General Motors Corp., 478 U.S. 621 (1986).

These decisions make it abundantly clear that the states are free to establish eligibility criteria for the receipt of unemployment benefits that either include or exclude strikers. New York Telephone, 440 U.S. at 544; Hodory, 431 U.S. at 487. By enacting La. Rev. Stat. Ann. § 23:1601(4) (West 1985), the Louisiana legislature has declared strikers ineligible for the receipt of unemployment benefits. Petitioner's relief from the decisions below, therefore, lies not with this Court, but with the Louisiana legislature.

Petitioner further argues that the decisions below erroneously relied on the National Labor Relations Act ("NLRA") in ascertaining whether the Strikers were employed or unemployed for purposes of their eligibility for unemployment compensation under Louisiana law. The only reference to the NLRA in the decisions below is the recognition, in dicta, that economic strikers have the right to reinstatement, upon application, as jobs become available. See, e.g., Abadie v. Bayou Steel Corp., 645 So. 2d 779, 782 (La. Ct. App. 1994) (citing NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)), writ denied, 649 So. 2d 403

(La. 1995). From this observation, Petitioner wrongly concludes that the courts below have placed the Strikers in some sort of perpetual state of "artificial employment" that permanently disqualifies them from receiving unemployment benefits. The irony is that it is Petitioner who would create an *artificial state of unemployment*, resulting in an immediate award of benefits, upon the expiration of the collective bargaining agreement, notwithstanding the fact that the Strikers continued to work under the terms of the expired agreement for several more weeks before deciding to go on strike.

It is obvious that the Louisiana courts did not rely on the NLRA in determining the eligibility of the Strikers for benefits under the Louisiana unemployment compensation law. Rather, the courts below expressly held that the Strikers were *unemployed* due to their participation in a labor dispute in active progress at their former place of employment and that they were ineligible for unemployment benefits under the Louisiana statute for that reason.

III. Denial of Benefits to Striking Workers Does Not Violate the Equal Protection Clause.

Petitioner's next point is that the denial of benefits to individuals participating in and interested in a labor dispute constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. Again, this Court previously has rejected this argument in a similar context. Hodory, 431 U.S. at 489-93. Indeed, this Court has held that the denial of benefits to striking employees is rationally related to legitimate state interests. Id. at 490-93; cf., Lyng v. UAW, 485 U.S. 360, 370-74 (1988) (denial of food stamps to striking workers does not violate Equal Protection Clause).

Because an unemployment compensation statute "does not involve any discernible fundamental interest," and because

striking workers are not a suspect class, the rational relation test applies to determine the constitutionality of Louisiana's unemployment compensation scheme. Hodory, 431 U.S. at 489; see also, Lyng, 485 U.S. at 370 n.8. Under the rational relation test, a statute is constitutional if it has a rational relation to a legitimate state interest. The Louisiana Supreme Court has recognized that the legitimate state interest in the statute at issue in this case is the need for the state to remain neutral in labor disputes by not forcing employers to finance strikes by their employees through an award of unemployment benefits by the state from a fund to which employers are required to contribute. National Gypsum Co. v. Administrator, 313 So. 2d 230, 233 (La.), appeal dismissed, 423 U.S. 1009 (1975). Louisiana's statutory disqualification of striking workers from receiving unemployment compensation clearly and rationally relates to this legitimate state interest.

Moreover, contrary to Petitioner's argument, Louisiana's unemployment compensation scheme does not result in unequal treatment of union and non-union workers. All of the disqualification provisions treat both the same. If either participates in a labor dispute by going on strike, he is denied benefits. If either chooses not to work for reasons unrelated to a labor dispute, he is denied benefits.[2] Similarly, if the union worker's collective bargaining agreement expires or the non-union worker's employment contract terminates and the employer discharges the employee or fails to offer further employment on the same or similar terms (unlike here), benefits are available;[3]

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[2]See La. Rev. Stat. Ann. § 23:1601(1), which disqualifies an unemployment compensation claimant if he quits "without good cause attributable to a substantial change made to the employment by the employer."

[3]See La. Rev. Stat. Ann. § 23:1601(2), which disqualifies an unemployment compensation claimant who has been discharged only if "he has been discharged...for misconduct connected with his employment."

but if either has the opportunity to continue working and fails or refuses (as here) to do so, benefits are denied.[4] In arguing that union and non-union workers are treated differently in the latter situation, Petitioner reveals a profound confusion about the fundamental differences between a collective bargaining agreement and an ordinary employment contract and about what happens when a collective bargaining agreement expires and the parties are still negotiating over the terms of a new agreement.

The Petitioner's assertion that bargaining-unit employees are "discharged" when a collective bargaining agreement expires is flatly wrong. Rather, in the absence of a negotiating impasse, federal law requires the employer to continue to offer employment to the employees under the same terms and conditions as were contained in the expired contract until a new agreement is reached. See, e.g., Litton Financial Printing v. NLRB, 501 U.S. 190, 198 (1991); Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.5, 544 n.6 (1988). Thus, in the absence of a lockout, when a collective bargaining agreement expires, the choice to continue working or not to work belongs to the employees. In this situation, if the employees choose to go on strike (i.e., choose not to work), they are ineligible for unemployment benefits. Similarly, when an individual employment contract expires, although the employer has no obligation to renew it or to continue its terms, if he does, the choice to work or not to work belongs to the employee. If the employee chooses not to continue the relationship, he quits, and benefits are not available. On the other hand, if, following the expiration of a collective bargaining agreement, the employer engages in a lockout, it is the employer's action that causes the unemployment, and, therefore, benefits are available. See Daigle v. Francis, No. 35949 (La. 29th J. Dist. Ct. Apr. 25, 1991) (copy included in Respondent's App. at A-3). Similarly, if, following

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[4]La. Rev. Stat. Ann. § 23:1601(1) and (4).

the expiration of an individual employment contract, the employer fails to offer a new agreement and, instead, discharges the employee, benefits are available. Thus, whether the situation involves a union worker covered by a collective bargaining agreement or a nonunion worker with an individual employment contract, the analysis for unemployment compensation purposes is really no different. It all comes down to why the employees are unemployed: Is it because they had a choice and chose not to work, or is it because they had no choice?

Although the respective rights and obligations of Bayou Steel and the Strikers under federal labor law had nothing to do with the denial of benefits in the decisions below, what was central to the decisions is that the Strikers chose not to continue working. The expiration of the collective bargaining agreement between Bayou Steel and the Union had nothing to do with the decisions below because it was not the cause of the Strikers' unemployment. Likewise, the fact that they were union members was irrelevant. The Strikers could have continued to work had they chosen to do so (like many of their co-workers). Instead, they chose to strike. Their decision not to work was the sole basis of the decisions below.

IV. Denial of Benefits to Striking Workers Does Not Violate Procedural Due Process.

In arguing that the denial of benefits to striking workers violates procedural due process, Petitioner again relies on the unfounded allegation of discrimination between union and non-union workers by the Louisiana courts. Indeed, Petitioner asserts that, under the statutory procedure for determining a claimant's eligibility as applied by the Louisiana courts, "the union-affiliated claimant is automatically disqualified." According to Petitioner, as a result of judicial interpretation, the only inquiry that will be

permitted in future unemployment cases is whether the claimants are members of a union. Petitioner's assertion is false and displays either a deliberate misreading or a profound misunderstanding of the decisions below and of the Louisiana unemployment compensation statute. Neither the unemployment compensation law nor the decisions below make any mention of consideration of a claimant's union or non-union status in deciding on a claim for benefits. Moreover, the Louisiana courts have never "automatically disqualified" a claimant because of his union status. Indeed, when the circumstances have been nondisqualifying under the statute, Louisiana courts have awarded unemployment benefits to union workers, even during labor disputes. See, e.g., Greyhound Lines, Inc. v. Strong, No. 79525 (La. 22nd J. Dist. Ct. Aug. 30, 1985) (union workers awarded benefits because employer forced employees' strike by unilateral implementation of drastic reductions in wages in benefits) (copy included in Respondent's App. at A-1); Daigle v. Francis, No. 35949 (La. 29th J. Dist. Ct. Apr. 25, 1991) (benefits awarded to union workers because their unemployment was caused by employer's lockout, not by workers' voluntary decision to strike) (copy included in Respondent's App. at A-3).

Simply put, before an award of benefits can be made or a claim can be denied, Louisiana law requires an examination of the cause of a claimant's unemployment, whether the claimant is union or not. Such an examination was undertaken in this case. The Strikers' claims for benefits were considered and reviewed fully by an administrative law judge following a lengthy trial, then by the Board of Review followed by the state district and appellate courts and, finally, by the Louisiana Supreme Court. The decisions to disqualify the Strikers turned on the fact that they were unemployed due to their voluntary participation in a strike, not that they were union members. There was no "automatic" disqualification of the Strikers because of their union status. They were disqualified, in accordance with the statute, because they chose to go on strike.

V. There Has Been No Infringement of the Requirement of Prompt Payment.

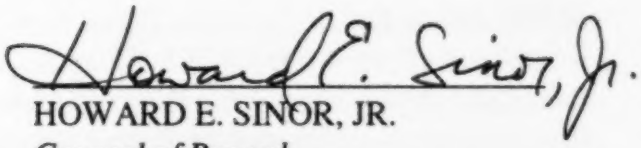
Petitioner's argument that the Strikers' rights to prompt payment of benefits under the Social Security Act and California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), have been infringed makes no sense. First, the argument is premised on the false assumption that an award of benefits to the Strikers is contingent on some unspecified action by the National Labor Relations Board ("NLRB"). Second, Petitioner's argument that the Strikers are not receiving their benefits "when due" assumes wrongly that the Strikers are entitled to benefits.

Manifestly, an award of benefits under Louisiana's unemployment compensation law does not depend on any action by the NLRB. The consideration of the Strikers' claims for benefits in this case was not delayed pending the outcome of any unrelated NLRB proceedings. Rather, the Strikers' claims for benefits were promptly and timely considered at all levels. As indicated above, the Strikers' claims were filed on March 21, 1993. Although the claims initially were denied, the Administrator reconsidered the issue on May 4, 1993 and awarded benefits retroactive to the date of filing. Benefits then were paid promptly and continued to be paid (albeit wrongfully) even while Bayou Steel appealed the award to the ALJ. Although the claimants have not received any benefits since the ALJ found they were disqualified, it is not because their right to "prompt payment" has been infringed; rather, it is because, under Louisiana law, they are not entitled to any benefits.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. This case involves exclusively state law issues. There is no federal question or significant constitutional issue present that requires the attention of this Court.

Respectfully submitted,



HOWARD E. SINOR, JR.
Counsel of Record
H. MARK ADAMS
KATY KIMBELL THERIOT
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 50th Floor
New Orleans, LA 70170-5100
Phone: (504) 582-8000
Fax: (504) 582-8011
Attorneys for Respondent,
Bayou Steel Corporation

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

NUMBER 79525 DIVISION "A"

GREYHOUND LINES, INC.,
VERSUS
ARTHUR T. SPRONG, AND LOUISIANA
DEPARTMENT OF EMPLOYMENT SECURITY,
GEORGE WHITFIELD, ADMINISTRATOR

CONSOLIDATED WITH

NUMBER 79506 DIVISION "C"

GREYHOUND LINES, INC.
VERSUS
CHARLES ABERNATHY, ET AL, AND THE
DEPARTMENT OF EMPLOYMENT SECURITY,
GEORGE WHITFIELD, ADMINISTRATOR

FILED: AUG. 30, 1985 /S/JEANICE A. LANDWEHR,
DEPUTY CLERK

REASONS FOR JUDGMENT

This is an appeal by Greyhound Lines, Inc., from an adverse ruling by the Department of Employment Securites granting striking employees unemployment for the time during which they walked the picket line. The appeals referee described the issue for the Court in his opinion after a hearing held on November 9, 1985, as follows:

> ....."The issue in this case is not whether the claimants participated in or were interested in the outcome of a labor dispute in active progress at their last place of employment. There is no

> question but that these claimants walked the picket line and did participate in the labor dispute. They were, of course, interested in the outcome of the labor dispute. The question in this case is whether their unemployment was caused by the labor dispute..."

The Court may not disturb the findings of the referee and Board unless those findings are not supported by the record. The jurisdiction of the Court only extends to questions of law. Vancouver Plywood Co., Inc., v. Sumrall, 415 So. 2d 625, (La. App. 3rd Cir. 1982). The referee found that the work stoppage was not caused by a labor dispute but by the institution of a unilateral pay and benefits cut by Greyhound. This Court finds that the findings and conclusions of the referee and Board of Review are such that it cannot disturb them.

Accordingly, the decision of the Board of Review is affirmed.

This Court will sign a judgment in accordance with these reasons when one is presented to it.

Covington, Louisiana, this 29 day of August, 1985.

/s/ Thomas W. Tanner, Judge
Division "C"

ERROL V. DAIGLE
VERSUS
B. J. FRANCIS, et al
NUMBER: 35,949

29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA
DIVISION: D

REASONS FOR JUDGMENT

This is an appeal from the Louisiana Board of Review's adjudication that petitioner is disqualified from receiving unemployment insurance benefits because of his involvement in a "labor dispute" during the March 4, 1989 strike of Eastern Airlines, Inc. employees.[1]

La. R.S. 23:1601(4) provides in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . .
>
> (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory; establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

Plaintiff is a member of the International Association of Machinists, Local 1905, which represents him in collective bargaining with Eastern Airlines. He contended he is exempt from the labor dispute disqualification since his unemployment

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[1] The present case involves only one claimant, Errol Daigle, who is a resident of St. Charles Parish.

resulted not from a labor dispute but from an offensive employer lockout unilaterally initiated by Eastern, and a drastic change in working conditions. Eastern contended, the Appeals Referee held and the Board of Review affirmed, that the unemployment was caused by a labor dispute.

The findings of fact, as determined by the appeals tribunal and adopted by the Louisiana Board of Review, are as follows:

> All of the claimants worked for the named employer at New Orleans International Airport with the exception of Mr. James R. Cranford who was last employed in Atlanta, Georgia. They worked in various capacities as mechanics, ramp service personnel and cleaners. They were all represented by the International Association of Machinists, and they belonged to Local Union 1905 in New Orleans.
>
> The contractual agreement between the International Association of Machinists Union and the employer expired on December 31, 1987. The employer was requesting that the union members accept lower rates of pay and lesser benefits while the union was requesting an eight percent increase in pay over a three year period for its members.
>
> No agreement could be reached, so it was determined on February 1, 1989, that the parties were at an impasse. It was agreed that the parties would continue with the "status quo" for a thirty-day "cooling off period" which would expire at 12:01 a.m. on March 4, 1989.

On February 14, 1989, a national vote was taken, and the union voted to go on strike if no agreement could be reached.

On March 3, 1989, the employer received permission from the United States District Court in Miami, Florida, to relieve union members of their duties for that day by putting them on an unscheduled paid holiday. At approximately 9:15 a.m. (CDT) those claimants who were working at the employer's location in New Orleans, Louisiana, were informed by Mr. Harry Hoover, Shift Manager, or by Mr. Richard Spatifora, Manager, that they should leave the premises for the day, that they were being given an unscheduled paid holiday. The workers were allowed to obtain personal items from the lockers and from employee lounges, but they were not required to remove these objects from the premises. None of the workers were told that they should not report to work the next day. Their duties for the rest of the day were performed by management personnel and by ticket agents. Although some of the locks on various workshops and buildings had been changed, employees were told that keys would be available for them should they need them.

Contract negotiations continued throughout that day, but no agreement was reached by midnight. The union did not offer to continue the "status quo." Mr. Thomas N. Hoggatt, President of Local 1905, was notified that the union would begin striking against the employer, and he contacted other union members to begin picketing

at the airport on the morning of March 4, 1989. None of the claimants attempted to return to work. One handicapped union member did return to work and was allowed to perform his regular duties. Western Union Mailgrams were sent to each of the union members informing them that they were expected to return to their next scheduled shift after 12:01 a.m., March 4, 1989. Most of them did not receive these until several days later, but none of them returned to work. It was not until after March 6, 1989, that the striking workers received Return to Work Procedures in the mail informing them of how they could return to their jobs and of what cuts in earnings and benefits would be imposed by the employer.

A few days later, the claimants learned that the employer had filed for bankruptcy under Chapter 11, so none of them have been paid for their last week of work nor for the holiday of March 3, 1989.

None of the claimants have informed the employer that they quit their jobs. They all expect to return to work with the named employer when the strike is settled.

Based upon these findings, the administrative law judge found that claimant and his co-workers were not locked out by the employer, but that their unemployment was as a result of a labor dispute in which they were interested or participating, and they were therefore disqualified from receiving unemployment insurance benefits. The Board of Review adopted this decision.

The court's appellate review of the holding by the Board of

Review is limited to questions of law if the findings of fact are supported by sufficient evidence and in the absence of fraud. La. R.S. 23:1634. A determination of whether there was a lockout is a conclusion of law based on the facts found by the administrative law judge.

A lockout is defined in La. R.S. 23:900:

> (2) "Lockout". A refusal by an employer to permit his employees to work as a result of a dispute with such employees that affects wages, hours and other terms and conditions of employment of said employees, provided, however, that a lockout shall not include a termination of employment for reasons deemed proper under Louisiana state and federal law.

National Gypsum Company v. Administrator, Louisiana Department of Employment Security, 313 So.2d 230 (La. 1975), held that unemployment due to a lockout by the employer is not "caused by a labor dispute which is in active progress. . . ."

The facts establish the claimant and his co-workers were sent home on the last day of the cooling off period for "an unscheduled paid holiday," and according to shift manager, Harry Hoover, would not have been allowed to remain on the employment premises had they asked to continue working. Further, those employees who testified stated that as they left the employment premises they saw non-union personnel dressed in the uniforms they customarily wore and performing their duties. One employee testified that she was informed that she would receive a phone call as to further developments. Another employee testified that he was informed that he was not to return to work "until the matter was resolved." All of the employees who testified indicated that they believed they were not to return to work.

The employer had begun training salaried employees for a "self-help" plan, under which those employees would take over the responsibilities of the claimant herein and his co-workers, approximately two weeks prior to March 4, 1989 (the end of the thirty-day cooling off period), and Aircraft Services International was in the process of training new employees as of one week prior to March 4, 1989. While the Board of Review made no specific findings as to these facts, the testimony of shift manager, Harry Hoover, was uncontradicted.

Several claimants testified that they were told to clean out their lockers and take their tools with them.

The locks on operations, maintenance and air freight facilities were changed on March 2 and 3, and the employees' identification badges were invalidated. Although the workers were told "that keys would be made available for [the employees] should they need them," they were not told that they would be allowed to return to work according to their original schedules and without restrictions. When asked what would have taken place had the employees returned to work on March 4, 1989, shift manager, Harry Hoover, testified, "We were instructed that. . .when employees showed up, speaking of hourly employees, they would be sent to Mr. Spatifora's office. Mr. Spatifora was to compile a list of those employees who wanted to work and would send that list to Miami."

Although there was no specific finding as to whether the employer offered to continue the status quo, the record indicates it did not do so.

The factual findings of the administrative judge as adopted by the Board of Review, lead to the legal conclusion that the claimant's unemployment resulted from a lockout by the employer and not from the "labor dispute in active progress." Although

there was a "labor dispute in active progress" at the employment premises, the claimant's unemployment was not due to the labor dispute, but was due rather to the employer's imposition of a lockout.

Further, the uncontradicted testimony shows that the reductions sought amounted to twenty to fifty percent in wages and substantial cuts in benefits. These reductions were unilaterally imposed by the employer. An employer's offer of continuation of employment at a reduction of twenty to fifty percent is tantamount to a layoff, in which case the employees would be entitled to unemployment benefits.[2]

---

[2] The issue of whether drastic reductions in pay benefits constitutes a lockout has not been addressed by Louisiana courts. However, substantial reductions, such as those involved herein, have been found to constitute good cause for resignation so as to allow receipt of unemployment compensation benefits. See Pelican Homestead Savings Ass'n v. Blache, 490 So.2d 642 (La. App. 2d Cir. 1986); Jantzen of Louisiana, Inc. v. Blache, 464 So.2d 33 (La. App. 3rd Cir. 1985); Robertson v. Brown, 139 So.2d 226 (La. 1st Cir. 1962). Further, cases from other jurisdictions are instructive on this issue. In Sunstar Foods, Inc. v. Uhlendorf, 310 N.W.2d 80 (Minn. 1981), the Minnesota Supreme Court held that reduction of wages by 21-26% is so unreasonable as to constitute a lockout. See also Local 730, v. Com., Unemp. Comp. Bd. of Rev., 480 A.2d 1000 (Penn. 1984), where the Pennsylvania Supreme Court held work stoppage following employer's refusal to maintain status quo constituted a lockout, entitling employees to unemployment compensation benefits.

The judgment disqualifying claimant from unemployment benefits must be reversed, and this case remanded for calculation of benefits.

Hahnville, Louisiana this 25th day of April, 1991.

/s/ Mary Ann Vial Lemmon, Judge

(3)

Supreme Court, U.S.
FILED
JUN 22 1995
OFFICE OF THE CLERK

No. 94-1821

In The

Supreme Court of the United States

October Term, 1994

GAYLE F. TRULY, SECRETARY OF THE LOUISIANA DEPARTMENT OF LABOR AND ADMINISTRATOR,

Petitioner,

versus

BAYOU STEEL CORPORATION,

Respondent,

and

HARRY ABADIE, JR., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITIONER'S RESPONSE TO RESPONDENT BAYOU STEEL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENISE ANN NAGEL
Counsel of Record
Louisiana Department of Labor
Office of the Secretary

VIRGINIA GERACE BENOIST
Assistant Attorney General
P.O. Box 94094
Baton Rouge, Louisiana 70804-9094
Telephone: (504) 342-7557
Facsimile: (504) 342-7593

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TO THE HONORABLE SUPREME COURT:

The opposition expressed by Respondent Bayou Steel necessitates a response by the Administrator to clarify her position, correct such Respondent's distortion of the bases for her application, and correct Respondent's misstatements of significant dates as follows:

I.

> **RESPONDENT'S STATEMENT (Pages 4-5):** "The following facts are established by the record and form the basis (sic) of the decisions below. . . . [w]hen the old agreement expired in February 1992, it was extended by mutual agreement through March 21, 1993. . . . On March 19, 1993, the Union notified the Company that the Union would not agree to another extension of the agreement . . . [which] expired two days later." (emphasis added)

ADMINISTRATOR'S REPLY: The date of expiration of contract, as stated by Respondent Bayou Steel Corporation, is not the same date found in the Administrative Record, to which all parties were bound in the state courts and administrative hearings, and to this point the date of expiration of contract has not been at issue. The Administrative Record at Page 1 states: "The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993." (emphasis added) (Appendix 1 to Petitioner's Response to Respondent Bayou Steel's Brief in Opposition to Petition for Writ of Certiorari)

II.

RESPONDENT'S STATEMENT (Page 5): "The first claims were filed on March 21, 1993. . . . "

RESPONDENT'S STATEMENT (Page 13): " . . . claims were filed on March 21, 1993."

ADMINISTRATOR'S REPLY: The first date of filing of claims, as stated by Respondent Bayou Steel Corporation, is not the same date found in the Administrative Record, to which all parties were bound in the state courts and administrative hearings, and to this point the first date of filing of claims has not been at issue. The Administrative Record at Volumes 3 and 4, which includes copies of all claims filed, reveals that the first claim was filed by non-union member Charles LaVerne Kyzar on March 8, 1993. The first claim filed by a union member was filed by Cornell Roussel on March 28, 1993. (Appendix 2 to Petitioner's Response to Respondent Bayou Steel's Brief in Opposition to Petition for Writ of Certiorari)

III.

RESPONDENT'S STATEMENT (Page 2): " . . . the Administrator arbitrarily reversed the initial determination and awarded benefits."

ADMINISTRATOR'S REPLY: The Administrator redetermined qualification for benefits for claimants only upon further investigation and on-site visitation, with personal communication between Louisiana Department of Labor officials and Bayou Steel management, which revealed replacement of workers for an indefinite time and an inability or unwillingness on the part of Bayou

Steel to provide a listing of which claimants had been replaced, resulting in a legitimate finding by the Administrator for a redetermination of unavailability of work for purposes of qualification for unemployment compensation.

IV.

> **RESPONDENT'S STATEMENT (Page 2):** " . . . the Louisiana Supreme Court denied the petitions (sic), finding the decisions below not worthy of further review."

ADMINISTRATOR'S REPLY: The Louisiana Supreme Court made no such statement in its denial of writs. (Appendix 36 Petition for Certiorari)

V.

> **RESPONDENT'S STATEMENT (Page 2, Footnote 1):** " . . . the position of the Administrator in this matter clearly was aligned with that of the Strikers."

ADMINISTRATOR'S REPLY: The position of the Administrator was not and is not, at any time, aligned with any party affiliation. The Administrator exercised her duty to impartially interpret and uphold the Louisiana Employment Security Law in accordance with the applicable federal law and federal and state constitutions. Any determination by the Administrator in favor of a particular party does not rise to a position of alignment with any such party. The Respondent Bayou Steel, on the

other hand, would not appreciate an accusation of "alignment" wherein the Administrator, in her capacity of Secretary of Labor and/or Administrator, has previously rendered any other determination in its own favor.

VI.

RESPONDENT'S STATEMENT (Page 3): "This Court, however, lacks jurisdiction over this action because it presents no genuine issue under any federal statute and raises no significant claim. . . . "

RESPONDENT'S STATEMENT (Page 3): "No federal constitutional provisions are involved in this case."

RESPONDENT'S STATEMENT (Page 4): " . . . the claimants for whom Petitioner seeks authority to award unemployment benefits are unemployed because they are on strike. They are unemployed because they have chosen to picket rather than to work. Therefore, because the claimants' unemployment is due to a labor dispute . . . they are disqualified . . . for unemployment compensation . . . [and] unemploy[ment is] solely because their collective bargaining agreement . . . has expired."

RESPONDENT'S STATEMENT (Page 8): " . . . this Court has held that the denial of benefits to striking employees is rationally related to legitimate state interests . . . Because an unemployment compensation statute 'does not involve any discernible fundamental interest,' and because striking workers are not a suspect class, the rational relation test applies to determine the constitutionality of Louisiana's

unemployment compensation scheme. . . . Louisiana's statutory disqualification of striking workers from receiving unemployment compensation clearly and rationally relates to this legitimate state interest."

RESPONDENT'S STATEMENT (page 10): "Petitioner reveals a profound confusion about the fundamental differences between a collective bargaining agreement and an ordinary employment contract and about what happens when a collective bargaining agreement expires and the parties are still negotiating over the terms of a new agreement."

RESPONDENT'S STATEMENT (Page 12): " . . . They were disqualified, in accordance with the statute . . . "

RESPONDENT'S STATEMENT (Page 6): " . . . the cornerstone of all of Petitioner's arguments is the false notion that the expiration of the collective bargaining agreement . . . caused the . . . unemployment."

RESPONDENT'S STATEMENT (Page 7): " . . . in *Ohio Bureau of Employment Services v. Hodory*, . . . "The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area . . . *New York Telephone Co.* . . . "

RESPONDENT'S STATEMENT (Page 7): " . . . The only reference to the NLRA in the decisions below is the recognition, in dicta, that

economic strikers have the right to reinstatement, upon application, as jobs become available. . . . "

ADMINISTRATOR'S REPLY: This application, to the contrary, presents a very genuine as well as novel issue under both the applicable federal statutes and the U.S. Constitution. The Administrator does not and cannot herein challenge the prerogative and "broad freedom" of the State Legislature to disqualify claimants who are unemployed due to a labor dispute. This state right has been recognized by this Honorable Court in previous precedence, cases of which have been quoted therein by Respondent Bayou Steel. Rather, the Administrator seeks review of this Honorable Court of the next further step of analysis to delve into the issue as to "how" and "when" such state disqualification should be administered in a consistent manner with applicable federal law and the U.S. Constitution. The issue lies before the Court that union and non-union workers become arbitrarily distinguished by current Louisiana jurisprudence in its failure to acknowledge and recognize separation from employment upon expiration of contract for union-affiliated claimants for purposes of unemployment compensation. Thus, the state disqualification for labor disputes does not create a "suspect class" within its statutory language; however, the state courts have interpreted such statutory disqualification in such a way to convert the union worker into a "suspect class".

Further, such state jurisprudence confused and misapplied the concept of continued employment under the NLRA with the concept of separation from employment at the point of contract expiration. Without such judicial

recognition of contract expiration for the union worker, the state courts were unable to inquire into the availability of jobs with Bayou Steel, whose failure to disclose the extent of availability was established in the Administrative Record. The state law under LSA-R.S. 23:1601(4) requires that unemployment, for unemployment compensation purposes, must be "due to a labor dispute in active progress". The state court conclusions did not examine the "due to" requirement and, thus, the rendered disqualifications were not "in accordance with the statute". The court's failure to fully recognize and examine the component factors of such statutory disqualification results in direct violation of the constitutional rights of the union worker to be equally treated in the review and examination of his unemployment for qualification of such benefits. While the Louisiana "unemployment compensation scheme does not result in the unequal treatment of union and non-union workers", the Louisiana judicial interpretation of such statutory scheme does violate such constitutional rights against the union worker by not affording the same analyses of cause of unemployment and availability of employment as would be ordinarily provided to a non-union worker filing an unemployment compensation claim upon expiration of contract.

The state statute in itself specifies that the cause of unemployment must be "due to a labor dispute in active progress". Yet the state courts ignored the very language of law and merely disqualified such union workers on the basis of the existence of a labor dispute, with the cause element under "due to" of the statute and the availability issue elsewhere under LSA-R.S. 23:1600 completely disregarded.

It is respectfully noted to the interest of the Court that if union workers, who have been replaced for an indefinite time, are required to individually apply for work by breaking the picket line (as opposed to obtaining such information as to availability of work from their union representative-agent) prior to any qualification for benefits, does this not infringe or violate their first amendment rights of freedom of affiliation (also recognized under NLRA) or rights to contract for representation by an agent?

VII.

RESPONDENT'S STATEMENT (Page 8): " . . . Petitioner . . . would create an artificial state of unemployment, resulting in an immediate award of benefits, upon the expiration of the collective bargaining agreement, notwithstanding the fact that the Strikers continued to work under the terms of the expired agreement for several more weeks before deciding to go on strike."

RESPONDENT'S STATEMENT (Page 11): " . . . Thus, whether the situation involves a union worker covered by a collective bargaining agreement or a nonunion worker with an individual employment contract, the analysis for unemployment purposes is really no different. It all comes down to why the employees are unemployed: Is it because they had a choice and chose not to work, or is it because they had no choice? . . . The expiration of the collective bargaining agreement . . . had nothing to do with the decisions below. . . . "

ADMINISTRATOR'S REPLY: This is not responsive to the issue. The fact of the matter is that the contract expired and the parties could not come to an agreement as to terms of a new contract of hire, thus, the claimants became unemployed (remuneration was not paid; services were not rendered) at the moment of expiration. Further, as to what transpired upon expiration of such contract, the issue then became that the employer would not disclose specifically who would be rehired under new contract of hire, whether such new contract was for each individual or a group of individuals, and at what jobs. Thus, the Administrator had no choice but to qualify claimants due to inability to determine availability of work to specific claimants. The Louisiana courts' interpretation of LSA-R.S. 23:1601(4) has thereby resulted in discrimination against union workers by automatic disqualification under the existence of the labor dispute without delving into the issue of availability of work as would be considered in the case of the non-union worker. Thus, the expiration of contract is an indispensable element for the union worker as much as for the non-union worker.

VIII.

> **RESPONDENT'S STATEMENT:** "Petitioner's . . . argument is premised on the false assumption that an award of benefits . . . is contingent on some unspecified action by the NLRB . . . [and Petitioner is wrong that to assume entitlement] to benefits."

PETITIONER'S RESPONSE (Page 13): The Administrator has not asserted that qualification for unemployment compensation relies solely upon any determination or conclusions of the NLRB. Rather, the Louisiana jurisprudence has failed to fully apply LSA-R.S. 23:1601(4) by not considering the relevancy of any complaints filed with the NLRB or decisions rendered by the NLRB. It is the Administrator's position that when any such information is available, the Administrator shall consider complaints filed with the NLRB or conclusions of the NLRB as a part of all relevant information. Simply put, such complaints and decisions are two of many factors considered. To ignore them would be arbitrary and capricious against one or both of the parties, in disregard of the "active progress" requirement under the statute. Additionally, contrary to the insinuations of Respondent Bayou Steel, the Administrator knows that the unemployment compensation program is not an entitlement program. Further, the Administrator applies the "prompt payment when due" requirement when there is sufficient available information for qualification for benefits under this remedial program of assistance.

Respectfully submitted,

/s/ Denise A. Nagel
DENISE ANN NAGEL
Counsel of Record
Louisiana Department of Labor
Office of the Secretary

VIRGINIA GERACE BENOIST
Assistant Attorney General
P.O. Box 94094
Baton Rouge, Louisiana 70804-9094
Telephone: (504) 342-7557
Facsimile: (504) 342-7593

APPENDIX 1.

ISSUES

DISQUALIFICATION FOR BENEFITS – R.S.23:1601(4)
DISQUALIFICATION FOR BENEFITS – R.S.23:1601(2)

CASE HISTORY

This case came before the Louisiana Board of Review upon an appeal timely filed by the claimants, through their legal representative, Louis L. Robein, Jr. The appeal is a result of a decision rendered by Chief Administrative Law Judge Dennis W. Dykes, Sr., on July 9, 1993. In his decision, Judge Dykes ordered that LSA-R.S. 23:1601(2) did not apply to the case, and there should be no disqualification assessment pursuant to that Section of Law. Judge Dykes further ordered that the redeterminations issued by the Agency, which did not disqualify the claimants for unemployment insurance benefits pursuant to LSA-R.S. 23:1601(4) be reversed, and the claimants be disqualified for benefits effective March 21, 1993.

EVIDENCE

The claimants worked for the employer under a bargaining agreement between the employer and the United Steelworkers of America, AFL-CIO-CLC (USWA) (hereafter referred to as "the union"). Most of the claimants worked the full six-year term of the agreement, March 1, 1987 through February 28, 1993.

Discussions regarding a new contract began January 15, 1993. A strike authorization vote was given by the union membership on February 24, 1993. The union notified the employer of the strike authorization vote. The

employer made preparations in case a strike occurred; those preparations included planning to hire replacements for striking employees.

The contract was to have expired on February 28, 1993; however, the union and employer agreed to two (2) extensions of the contract, through March 20, 1993. Negotiations continued; a settlement could not be reached.

March 19, 1993 the union and company met. The union refused to agree to another extension of the expiring contract; the union did agree to give the employer 48 hours notice of a called strike. Approximately two hours later, the union advised the employer that it would begin a strike on March 21, 1993.

March 20, 1993 the employer made a "last ditch" offer in an effort to avert a strike. They informed the union that if the offer was rejected by the membership, the employer would determine that an impasse had been reached and that the conditions of the March 19, 1993 offer would be imposed. The union bargaining committee, having been authorized by the membership vote on February 24, 1993, rejected the offer and advised the employer that the strike would proceed. An impasse was not declared.

The strike began March 21, 1993. All of the claimants have participated in the strike by refusing to return to work and/or by walking the picket lines.

* * *

APPENDIX 2.

NOTICE OF CLAIM DETERMINATION

LA DEPARTMENT OF LABOR
LAPLACE AREA OFFICE
POST OFFICE BOX 940
LAPLACE, LA 70069-0940

KYZAR CHARLES L
205 ROBERTS RD
HAMMOND LA 70401- 0

BAYOU STEEL
CORP

P. O. BOX 5000
LAPLACE, LA
70069-0000

SOCIAL SECURITY
NUMBER: 435-62-4414
EFFECTIVE DATE OF
CLAIM: 03/28/93
TYPE CLAIM: LA1
BATCH NUMBER: 527
DATE MAILED: 05/04/93
DETERMINATION NO: 321402
LO#: 780

THE DISQUALIFICATION WHICH WAS IMPOSED UPON YOU FROM 03/21/93, BECAUSE OF A LABOR DISPUTE, WAS REMOVED AS OF 03/20/93. ADDITIONAL AVAILABLE INFORMATION INDICATES THAT WORK MAY NOT BE AVAILABLE FOR YOU AT YOUR PLACE OF EMPLOYMENT. THEREFORE, BENEFITS ARE ALLOWED. SEE REVERSE SIDE SECTION 1601(4).

PLEASE NOTE YOUR APPEAL RIGHTS SHOWN BELOW.

APPEAL RIGHTS:

IF YOU DO NOT OR YOUR EMPLOYER DOES NOT AGREE WITH THIS DETERMINATION, THE AREA OFFICE SHOWN ABOVE MUST BE CONTACTED, IN PERSON OR BY MAIL. PERSONNEL OF THIS OFFICE WILL ASSIST IN PREPARING AN APPEAL. IF YOU APPEAL, YOU SHOULD CONTINUE TO FILE CLAIMS UNTIL A FINAL DECISION IS RENDERED OR YOU RETURN TO WORK. IF THIS APPEAL IS NOT POSTMARKED/DELIVERED WITHIN 15 DAYS OF THE DETERMINATION MAILING DATE, YOUR APPEAL RIGHTS WILL BE LOST.

ADMINISTRATIVE OFFICE COPY LDOL-ES 385A
(REV 03/93) MD-385A

LABOR DISP ROOM # 328 EA# 000000

NOTICE OF CLAIM DETERMINATION

LA DEPARTMENT OF LABOR
HAMMOND AREA OFFICE
POST OFFICE BOX 3068
HAMMOND, LA 70404-3068

KYZAR CHARLES L
205 ROBERTS RD
HAMMOND LA 70401- 0

BAYOU STEEL CORP

P. O. BOX 5000
LAPLACE, LA
70069-0000

SOCIAL SECURITY NUMBER: 435-62-4414
EFFECTIVE DATE OF CLAIM: 03/28/93
TYPE CLAIM: LA1
BATCH NUMBER: 527
DATE MAILED: 04/14/93
DETERMINATION NO: 351402
LO#: 330

YOU HAVE BEEN DISQUALIFIED FROM 03/21/93 FOR ALL WEEKS OF UNEMPLOYMENT CAUSED BY A LABOR DISPUTE. SEE REVERSE SIDE SECTION 1601(4).

YOU ARE UNEMPLOYED AS THE RESULT OF A LABOR DISPUTE AT YOUR PLACE OF EMPLOYMENT. YOU ARE NOT A MEMBER OF THE STRIKING UNION. HOWEVER, YOU WILL NOT ACCEPT AVAILABLE WORK BECAUSE YOU ARE HONORING THE PICKET LINE. THEREFORE, BENEFITS ARE DISALLOWED FOR THE DURATION OF THE LABOR DISPUTE

PLEASE NOTE YOUR APPEAL RIGHTS SHOWN BELOW.

APPEAL RIGHTS:

IF YOU DO NOT OR YOUR EMPLOYER DOES NOT AGREE WITH THIS DETERMINATION, THE AREA OFFICE SHOWN ABOVE MUST BE CONTACTED, IN PERSON OR BY MAIL. PERSONNEL OF THIS OFFICE WILL ASSIST IN PREPARING AN APPEAL. IF YOU APPEAL, YOU SHOULD CONTINUE TO FILE CLAIMS

UNTIL A FINAL DECISION IS RENDERED OR YOU RETURN TO WORK. IF THIS APPEAL IS NOT POSTMARKED/DELIVERED WITHIN 15 DAYS OF THE DETERMINATION MAILING DATE, YOUR APPEAL RIGHTS WILL BE LOST.

ADMINISTRATIVE OFFICE COPY LDOL-ES 385A
(REV 03/93) MD-385A
LABOR DISP ROOM # 328 EA# 362350

CLAIMANT'S STATEMENT – LABOR DISPUTE

Please complete this questionnaire and return it to this office in person. The requested information will enable us to make a prompt determination of your eligibility.

You may, if you wish, bring witnesses with you, or any evidence or documents which have bearing on the case. You may bring someone to represent you, such as an attorney, union representative, etc. *You are not required to do so.*

To decide your case fairly, detailed information is needed and it is to your advantage to give all the information you can.

Name Charles LaVerne Kyzar SS# 435-62-4414

OUR RECORDS INDICATE YOU ARE NO LONGER EMPLOYED BECAUSE OF A LABOR DISPUTE.

WHAT IS THE NAME OF THE COMPANY YOU WORK FOR? Bayou Steel of LaPlace

WHAT WAS YOUR LAST DAY OF WORK FOR THIS COMPANY? 3/21/93

WHAT DATE DID THE LABOR DISPUTE BEGIN? 2-28-93

WHAT IS THE NAME AND LOCATION OF THE COMPANY WHERE THE LABOR DISPUTE IS IN PROGRESS?

Name Bayou Steel Location LaPlace, LA

ARE YOU A MEMBER OF THE STRIKING UNION? YES _ NO X

WHAT IS THE NAME AND NUMBER OF THE UNION ON STRIKE? USWA – 9121

WHAT IS THE NAME AND NUMBER OF YOUR UNION? I AM NOT UNION – 9121

WHAT ORGANIZATION IS YOUR BARGAINING UNIT? 9121

WHAT IS YOUR CRAFT OR OCCUPATION? Operator

WERE YOU TOLD BY ANYONE WITH THE COMPANY NOT TO REPORT FOR WORK? YES _ NO X

IF YES, GIVE THE NAME AND POSITION OF THE PERSON WHO TOLD YOU NOT TO REPORT FOR WORK.

Name _____ Position _____

WERE YOU TOLD BY ANYONE FROM YOUR UNION NOT TO REPORT FOR WORK? YES _ NO X

IF YES, GIVE THE NAME AND POSITION OF THE PERSON WHO TOLD YOU NOT TO REPORT FOR WORK.

Name _____ Position _____

DID YOU REPORT FOR WORK OR HAVE YOU TRIED TO REPORT? YES _ NO X

IF NOT, WHY NOT? Picket Line

WERE YOU ABLE TO GET TO YOUR WORK STATION? YES _ NO X

DID ANYONE PREVENT YOU FROM REPORTING TO YOUR WORK STATION? YES _ NO X

IF YES, WHO PREVENTED YOU FROM WORKING? _

_____

WERE YOUR SUPERVISORS ON THE JOB? YES X NO _

WAS WORK AVAILABLE FOR YOU? YES X NO _

WAS THERE A PICKET LINE AT THE JOB SITE? YES X NO _

IF YES, WHO SET UP THE LINE? USWA – 9121

HAVE YOU BEEN WALKING ON THE PICKET LINE? YES _ NO X

HAS ANY MEMBER OF YOUR UNION BEEN WALKING THE PICKET LINE? YES X NO _

WILL YOU BENEFIT FROM A CONTRACT NEGOTIATED BY THE STRIKING UNION? YES X NO _

DOES YOUR UNION CURRENTLY HAVE A WORKING CONTRACT? YES _ NO X

ANY FURTHER INFORMATION THAT YOU MAY WISH TO FURNISH CAN BE LISTED BELOW:

I have made these statements for the purpose of obtaining benefits, knowing that the Law provides penalties for false statements or for withholding facts.

Date 3/8/93 Your Signature /s/ Charles L. Kyzar

NOTICE: FAILURE TO PROPERLY COMPLETE THIS FORM MAY RESULT IN A DELAY OF PROCESSING YOUR CLAIM. IF YOU NEED ASSISTANCE, THE PERSONNEL OF YOUR LOCAL CLAIMS OFFICE SHOULD BE REQUESTED TO ASSIST YOU.

STATE OF LOUISIANA

PARISH OF TANGIPAHOA

BEFORE ME, the undersigned authority, personally came and appeared:

CHARLES LAVERNE KYZAR

who deposed and stated that:

I, Charles LaVerne Kyzar, am and have been a non-union employee of Bayou Steel for 12 years.

I have not now, nor do I intend in the future, to quit my position with Bayou Steel; however, due to current labor relations and the ensuing strike have felt it necessary, due to the fear of bodily injury, and repercussions to me or to my family, which may occur now or in the future, not to cross the union picket lines while the strike is in effect.

I feel that in crossing the picket line I subject myself and my family to unnecessary and needless mental anguish, emotional distress and worry.

Again, I am stating that I have not, nor do not, intend to quit my position with Bayou Steel.

/s/ Charles L. Kyzar
CHARLES LAVERNE KYZAR

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 22nd DAY OF March, 1993.

/s/ Illegible
NOTARY PUBLIC

NOTICE OF CLAIM DETERMINATION

LA DEPARTMENT OF LABOR
LAPLACE AREA OFFICE
POST OFFICE BOX 940
LAPLACE, LA 70069-0940

ROUSSEL CORNELL
43132 PINEWOOD AVE
PRAIRIEVILLE LA 70769- 0

BAYOU STEEL CORP

P. O. BOX 5000
LAPLACE, LA
70069-0000

SOCIAL SECURITY NUMBER: 435-06-2542
EFFECTIVE DATE OF CLAIM: 03/28/93
TYPE CLAIM: LA1
BATCH NUMBER: 525
DATE MAILED: 05/04/93
DETERMINATION NO: 321402
LO#: 780

THE DISQUALIFICATION WHICH WAS IMPOSED UPON YOU FROM 03/21/93, BECAUSE OF A LABOR DISPUTE, WAS REMOVED AS OF 03/20/93. ADDITIONAL AVAILABLE INFORMATION INDICATES THAT WORK MAY NOT BE AVAILABLE FOR YOU AT YOUR PLACE OF EMPLOYMENT. THEREFORE, BENEFITS ARE ALLOWED. SEE REVERSE SIDE SECTION 1601(4).

PLEASE NOTE YOUR APPEAL RIGHTS SHOWN BELOW.

APPEAL RIGHTS:

IF YOU DO NOT OR YOUR EMPLOYER DOES NOT AGREE WITH THIS DETERMINATION, THE AREA OFFICE SHOWN ABOVE MUST BE CONTACTED, IN PERSON OR BY MAIL. PERSONNEL OF THIS OFFICE WILL ASSIST IN PREPARING AN APPEAL. IF YOU APPEAL, YOU SHOULD CONTINUE TO FILE CLAIMS UNTIL A FINAL DECISION IS RENDERED OR YOU RETURN TO WORK. IF THIS APPEAL IS NOT POSTMARKED/DELIVERED WITHIN 15 DAYS OF THE DETERMINATION MAILING DATE, YOUR APPEAL RIGHTS WILL BE LOST.

ADMINISTRATIVE OFFICE COPY LDOL-ES 385A
(REV 03/93) MD-385A

LABOR DISP ROOM # 328 EA# 000000

NOTICE OF CLAIM DETERMINATION

LA DEPARTMENT OF LABOR
LAPLACE AREA OFFICE
POST OFFICE BOX 940
LAPLACE, LA 70069-0940

ROUSSEL CORNELL
43132 PINEWOOD AVE
PRAIRIEVILLE LA 70769- 0

BAYOU STEEL
CORP

P. O. BOX 5000
LAPLACE, LA
70069-0000

SOCIAL SECURITY
NUMBER: 435-06-2542
EFFECTIVE DATE OF
CLAIM : 03/28/93
TYPE CLAIM: LA1
BATCH NUMBER: 525
DATE MAILED: 04/14/93
DETERMINATION NO: 351401
LO#: 780

YOU HAVE BEEN DISQUALIFIED FROM 03/21/93 FOR ALL WEEKS OF UNEMPLOYMENT CAUSED BY A LABOR DISPUTE. SEE REVERSE SIDE SECTION 1601(4).

YOU ARE UNEMPLOYED AS THE RESULT OF A LABOR DISPUTE. YOU ARE PARTICIPATING IN/INTERESTED IN THE LABOR DISPUTE IN ACTIVE PROGRESS AT YOUR PLACE OF EMPLOYMENT. THEREFORE, BENEFITS ARE DENIED FOR THE DURATION OF THE LABOR DISPUTE.

PLEASE NOTE YOUR APPEAL RIGHTS SHOWN BELOW.

APPEAL RIGHTS:

IF YOU DO NOT OR YOUR EMPLOYER DOES NOT AGREE WITH THIS DETERMINATION, THE AREA OFFICE SHOWN ABOVE MUST BE CONTACTED, IN PERSON OR BY MAIL. PERSONNEL OF THIS OFFICE WILL ASSIST IN PREPARING AN APPEAL. IF YOU APPEAL, YOU SHOULD CONTINUE TO FILE CLAIMS UNTIL A FINAL DECISION IS RENDERED OR YOU RETURN TO WORK. IF THIS APPEAL IS

NOT POSTMARKED/DELIVERED WITHIN 15 DAYS OF THE DETERMINATION MAILING DATE, YOUR APPEAL RIGHTS WILL BE LOST.

ADMINISTRATIVE OFFICE COPY LDOL-ES 385A
(REV 03/93) MD-385A

LABOR DISP ROOM # 328 EA# 000000

CLAIMANT'S STATEMENT – LABOR DISPUTE

READ:

Please complete this form in detail. The requested information will enable us to make a prompt and fair determination on your claim for unemployment insurance benefits.

To decide your case fairly, detailed information is needed, and it is to your advantage to present in detail all pertinent facts related to this case.

1. Name Cornell Roussel 2. Social Security Number 435-06-2542

3. Are you no longer employed because of a Labor Dispute? Yes ( ) No (✓)

4. What is the name and address of the company you work for?

   Name Bayou Steel Address P.O. Box 5000 LaPlace

5. What was your last date of work for this company? 3-21-93

6. What date did the Labor Dispute begin? 3-1-93

7. What is the name and address of the company where the Labor Dispute is in progress?

   Name _____ Address _____

8. Are you a member of a striking union? Yes (✓) No ( )

9. What is the name and number of the union on strike? Steelworker/9121

10. What is the name and number of your union? Steelworker/9121

11. What organization is your bargaining unit? _____

12. What is your craft or occupation? Matl. Handler

13. Were you told by anyone with the company or the union not to report to work? Yes ( ) No (✓)

    If Yes, give the name and position of the person who told you not to report for work.

    Name _____ Position _____

14. Did you report for work, or have you tried to report? Yes ( ) No (✓)

    If No, why not? I was forced not to because, lower wages and subcontracting out my job.

15. Were you able to get to your work station? Yes (✓) No ( )

16. Did anyone prevent you from reporting to your work station? Yes ( ) No (✓)

    If Yes, who prevented you from working? _____

17. Were your supervisors on the job? Yes (✓) No ( )

18. Was work available for you? Yes (✓) No ( )

19. Was there a picket line at the jobsite? Yes (✓) No ( )

If Yes, who set up the line? Members of the Local 9121

20. Have you been walking the picket line? Yes (✓) No ( )

21. Will you benefit from a contract negotiated by the striking union? Yes (✓) No ( )

22. Does your union currently have a working contract? Yes ( ) No (✓)

Any further information that you may wish to furnish can be listed below or on additional paper requested from the interviewer.

The reason we are on strike is the company want to reduce my pay & benefits by 1.39 per hour. They want to subcontract my job out.

I have made this statement for the purpose of obtaining unemployment insurance benefits, knowing that the law provides penalties for false statements or for withholding facts.

3/28/93
Date

Claimant's Signature

Interviewer's Signature